No. 83-1179

IN THE
Supreme Court of the United States

October Term, 1983

RICHARD W. STENQUIST,
Petitioner,

v.

MARILYN B. STENQUIST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTION PRESENTED

May California declare military disability retirement pay to be community property and divide the same between the husband and the wife in a proceeding to dissolve their marriage, in light of the decision of the United States Supreme Court in *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed. 589, 101 S.Ct. 2728 (1981) and Section 1408(a)(4) of the Uniformed Services Former Spouses Protection Act (Pub.L. 97-252, 10 U.S.C. § 1408(a)(4)), which excepts "disability retirement pay" from the definition of "disposable retired or retainer pay"?

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Petitioner, Richard W. Stenquist, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the State of California, Fourth Appellate District, Division One, rendered in these proceedings on July 26, 1983.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law rendered in the trial court is appended as Appendix A. The Interlocutory Judgment of Dissolution of Marriage made by the trial court is appended as Appendix B. The decision on appeal by the Supreme Court of the State of California (*In Re Marriage of Stenquist* (1978) 21 Cal.3d 779) is attached as Appendix C. The trial court's Order Pursuant To Remittitur and Order on Order To Show Cause, Establishing Spousal Support Jurisdiction, Arrearages and Payment Thereof, and for Attorney Fees and Costs filed on September 20, 1979 and following the decision of the California Supreme Court in *In re the Marriage of Stenquist, supra* is attached as Appendix D. The opinions and order of the trial court rendered subsequent to the opinion of this Court in *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981), is attached as Appendix E. The Opinion, on appeal, of the Court of Appeal of the State of California, Fourth Appellate District, Division One rendered on July 26, 1983 (*In Re Marriage of Stenquist*, 145 Cal.App.3d 430 [July, 1983]) appears as Appendix F and the decision of the Supreme Court of the State of California, declining a hearing in that Court and dated October 20, 1983, appears at Appendix G. A copy of the Uniformed Services Former Spouses Protection Act, Pub.L. 97-252 (10 U.S.C. 1408) is found at Appendix H.

JURISDICTION

The order of the Supreme Court of the State of California denying a hearing in this case was entered on October 20, 1983. See Appendix G. This Petition for a Writ of Certiorari was filed less than ninety days from the date thereof. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article 1, Section 8, Clauses 12 and 14:

> (12) ARMY. To raise and support Armies, but no Appropriation of Money to that use shall be for longer term than two years.

(14) GOVERNMENT AND REGULATION OF LAND AND NAVAL FORCES. To make Rules for the Government and Regulation of the land and Naval Forces.

Constitution of the United States, Article III, Section 2:

"The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Constitution of the United States, Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."

The Uniformed Services Former Spouses Protection Act (Pub.L. 97-252; 10 U.S.C. § 1408)

"§ 1408. Payment of retired or retainer pay in compliance with Court orders

"(a) In this section:

"(4) 'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (*other than the retired pay of a member retired for disability under Chapter 61 of the title*). . . . (Emphasis supplied)

"(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as the property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

STATEMENT OF FACTS

At the time of the commencement of this action for an Interlocutory Judgment of Dissolution of Marriage, the Petitioner-Husband[1] was a retired colonel, United States Army. He had earlier retired with an 80 percent disability, pursuant to 10 U.S.C. § 1210. The Husband elected to receive "disability" pay computed in accord with the provisions of 10 U.S.C. § 1201, Formula 1. The California trial court, relying upon the earlier decision of the California Supreme Court in *In re Marriage of Fithian* (1974) 10 Cal.3d 592, reasoned that to permit the Husband by a unilateral election to receive a disability pension would permit him to transmute community property into his own separate property and would negate the protective philosophy of the community property law as set out in previous decisions of the California Supreme Court. The trial court awarded his Wife that portion of the Husband's pension as represented one-half her community property interest in what would have been the Husband's normal military longevity retirement pension. The Husband appealed. The California Supreme Court in its decision in *In re Marriage of Stenquist* (1978) 21 Cal.3d 779, approved the trial court's apportionment of the Husband's military disability retirement pay.

The facts set forth above are based upon and are a summary of the facts set forth in *In re Marriage of Stenquist, supra*, at 21 Cal.3d at 783, 784. (Appendix C)

Upon remand, the Superior Court on September 20, 1979 issued its order providing, *inter alia*, that:

> "IT IS FURTHER ORDERED that all prior orders of this Court set forth in the Interlocutory and final Judgment herein and otherwise, not inconsistent with the Orders herein, shall remain in full force and effect." (See Appendix D, pages 3 and 4.)

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[1] For purposes of convenience, hereinafter the Petitioner will be referred to as the "Husband", and the Respondent will be referred to as the "Wife."

On June 26, 1981, the United States Supreme Court issued its opinion in *McCarty v. McCarty* (1981) 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728. Relying on that opinion, the Husband ceased payments to the Wife. On December 4, 1981, the Wife filed a Notice of Motion for, among other things, "Adjudication of [the Wife's] rights to portion of [the Husband's] disability retirement pay and arrearages."

In her attorney's declaration in support of the motion, it was recognized the Husband had ceased payment to the Wife in reliance upon the decision of the United States Supreme Court in *McCarty v. McCarty, supra*.

The Husband filed his opposition on February 2, 1982, arguing that *McCarty* and the later decision of this Court in *Ridgway v. Ridgway* (1981) 454 U.S. 46, 70 L.Ed.2d 39, 102 S.Ct. 49, overruled and rendered void, so much of the decision in *In re Marriage of Stenquist, supra*, and the orders of the Superior Court based thereon as purported to divide a portion of the Husband's disability pay by reason of that decision's conflict with the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

The trial court, on May 20, 1982, entered its order overruling the contentions of Husband.

The Husband's timely Notice of Appeal was filed on June 4, 1982.

Subsequent to the filing of the Husband's appeal, Congress enacted the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (P.L. 97-252), hereinafter "FSPA" (Appendix H). The effect of the FSPA was discussed in the briefs filed in the Court of Appeal of the State of California, Fourth Appellate District, and was discussed in the opinion of that Court. See Appendix F, p. 4.

REASONS FOR GRANTING THE WRIT

It is necessary this Court review this case in order to determine whether the application of California's community property laws to military disability retirement pay and the division thereof between a husband and a wife in a dissolution of marriage proceeding offends against the Supremacy Clause of the United States Constitution by interfering directly with the legitimate power of the Federal Government in its determination of the amount of a service member's disability retirement pay and to whom it may be given. See *McCarty v. McCarty, supra*, at 453 U.S. 232-235, inclusive, and FSPA at 10 U.S.C. § 1408(a)(4). Granting the prayed for Writ is necessary to correctly interpret the FSPA, and, in particular, the meaning and effect of that portion of 10 U.S.C. § 1408(a)(4) excepting "disability retirement pay" from the definition of "disposable retired or retainer pay."

Subsumed within the above issue are two important subissues relating to the effects of decisions of this Court.

The first subissue concerns the "retroactivity" of the *McCarty* decision, *i.e.*, whether decisions of this Court declaring state law offensive to the Supremacy Clause of the Federal Constitution may be applied to earlier state decisions which had become final prior to the decision of this Court. In this context, see the decisions of the California Court of Appeals in *In Re the Marriage of Sheldon* (1981) 124 Cal.App.3d 371, 376; *In Re the Marriage of Fellers* (1981) 125 Cal.App.3d 254, 256; and *In Re the Marriage of Mahone* (1981) 123 Cal.App.3d 17. As stated by the *Fellers* court, "a decision should not be applied retroactively where a final judgment has been rendered on appeal." See *In Re Marriage of Fellers, supra*, at p. 256. These decisions weaken the effect of the Supremacy Clause and ignore the fact that state action offensive to the Supremacy Clause is void and without subject matter jurisdiction. See *New Mexico v. Mescalero Apache Tribe* (1983) ____ U.S. ____, 76 L.Ed.2d 611, 103 S.Ct. 2378.

The second subissue is whether Congress "overruled" the decision of this Court in *McCarty v. McCarty, supra*. See the decision of the Court of Appeal below, *In Re the Marriage of Stenquist* (1983) 145 Cal.App.3d 430, 433 (Appendix F), and also the California Court of Appeal decision in *In re the Marriage of Ankenman* (1983) 142 Cal.App.3d 833, 837 (Official Advance Sheets, No. 15, issued June 7, 1983) and *In re the Marriage of Frederick* (1983) 141 Cal.App.3d 876, 879 (Official Advance Sheets No. 12, issued May 5, 1983), holding that Congress, by enacting FSPA, had overruled *McCarty* and abrogated all applications of the *McCarty* decision. The question of whether Congress overruled *McCarty*, whether Congress has the power to overrule a decision of this Court, and whether the attempt to do so violates the Doctrine of Separation of Powers are all important issues that must be decided.

First, it is necessary to determine what is the correct interpretation of FSPA and in particular, 10 U.S.C. § 1408(a)(4) and its effect upon whether military disability retired pay is divisible in dissolution proceedings as property.

MAY CALIFORNIA DELCARE MILITARY DISABILITY RETIREMENT PAY TO BE COMMUNITY PROPERTY AND DIVIDE THE SAME BETWEEN THE HUSBAND AND THE WIFE IN A PROCEEDING TO DISSOLVE THEIR MARRIAGE, IN LIGHT OF THE DECISION OF THE UNITED STATES SUPREME COURT IN *McCARTY V. McCARTY*, 453 U.S. 210, 69 L.ED. 589, 101 S.Ct. 2728 (1981) and SECTION 1408(a)(4) OF THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (PUB.L. 97-252, 10 U.S.C. § 1408(a)(4)), WHICH EXCEPTS "DISABILITY RETIREMENT PAY" FROM THE DEFINITION OF "DISPOSABLE RETIRED OR RETAINER PAY"?

This Court, speaking in *McCarty v. McCarty, supra*, ruled that under the doctrine of federal preemption expressed by the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, the state courts, through the application of state community property laws, are not to interfere

directly with a legitimate exercise of the power of the Federal Government in its determination of the amount of a service member's retired pay and to whom it may be given. 453 U.S. 232-235, inclusive. Parenthetically, the Husband notes that while *McCarty* deals only with nondisability (longevity) retirement, its principles are applicable to all forms of military retirement.

At the outset, it will be noted that under current law there are three basic forms of military retirement: nondisability retirement, disability retirement, and reserve retirement. *McCarty v. McCarty, supra* at 453 U.S. 213. Footnote 4 of the *McCarty* decision states "For an overview of the disability and reserve retirement systems, see Subcommittee on Investigations, House Committee on Post Office and Civil Service, Dual Compensation Paid to Retired Uniformed Services Personnel in Federal Civil Service Positions, 95th Cong. 2d Sess, 18-20 (Comm. Print 1978)." Hereinafter, this report will be referred to as "Subcommittee on Investigations."

The Subcommittee on Investigations at Page 18 of their report states:

> "There are three basic types of military retirement: (1) nondisability retirement which can be voluntary or involuntary, (2) disability retirement, and (3) reserve retirement. Each type retirement serves a distinct purpose within the overall objective of maintaining a young and vigorous force."

Later in its report, the Subcommittee on Investigations commenting on disability retirement states:

> "*Disability retirement* is intended to provide financial security for personnel forced by physical disability to retire from military service. Disability retirement pay is geared to the percentage of disability, but entitlement to disability retirement requires a minimum disability of 30 percent." *Id.* at p. 19.

We are here dealing with disability retirement pay and not with non-disability retirement which was the subject of the *McCarty* decision. See 453 U.S. at 213.

In response to this Court's invitation in *McCarty* to Congress to provide "more protection" to former spouses of military retirees, Congress enacted the "FSPA".

Congress, in enacting the FSPA, provided in 10 U.S.C. § 1408(c)(1) that:

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

However, in defining "disposable retired or retainer pay" Congress specifically excluded "the retired pay of a member retired for disability under chapter 61 of [Title 10, U.S.C.]." 10 U.S.C. § 1408(a)(4). This Court is requested to judicially notice that 10 U.S.C. § 1201, the provision of Title 10 under which the petitioner retired, is contained within Chapter 61 of Title 10, United States Code. Thus, Congress has *not* accorded to the States the power to apply state community property laws to disability retirement pay, nor may the states interfere directly with a legitimate exercise of the power of the Federal Government in its determination of the disability retired service member's disability pay and to whom it may be given. *McCarty v. McCarty, supra*, 453 U.S. at 232-235, inclusive. The attempt of California to exercise power over the character of the Husband's disability pay and to whom it may be given was and is void as an unconstitutional infringement upon the powers of Congress protected by the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2. In this respect, California lacks subject matter jurisdiction. See *New Mexico v. Mescalero Apache Tribe* (1983) ____ U.S. ____, 76 L.Ed.2d 611, 103 S.Ct. 2378.

An examination of constitutional history and this Court's decisions relating to the Supremacy Clause of the U.S. Constitution demonstrates beyond doubt that state action in a field preempted by the federal government is void. Preemption by the federal government, quite simply, deprives the state and state courts of subject matter jurisdiction, and this has been understood from the earliest days of our country.

In 1788, Oliver Ellsworth, a former Chief Justice of the Supreme Court of the United States, in his speech to the assembled delegates of the State of Connecticut in that State's constitutional convention to decide upon adopting the then newly proposed federal constitution, had this to say concerning the Supremacy Clause:

> "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. *On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void*, and upright independent judges will declare it to be so." (Emphasis supplied.) 2 *Elliot's Debates* 196 (1836, reprinted 1937). See also H.E. Willis' *Constitutional Law of the United States*, the Principia Press, p. 77 (1936).

The laws of a state which violate the Supremacy Clause of the Constitution of the United States are void and of no force or effect. Although predictable from the Constitutional debates, this effect has been clear law of the land since the landmark 1819 decision of the U.S. Supreme Court in *McCulloch v. Maryland* (1819) 17 U.S. 316, 4 Wheat 316, 4 L.Ed. 579. In *McCulloch*, Chief Justice Marshall construed the Supremacy Clause as the bulwark of national power it has since remained, when he declared:

> "The states have *no power* by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." 4 Wheat at 463 (emphasis supplied).

Chief Justice Marshall again articulated the meaning of the Supremacy Clause in *Gibbons v. Ogden* (1824) 9 Wheat 1, 6 L.Ed. 23, when he stated:

> "The *nullity* of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law." 9 Wheat at 210, 211 (emphasis supplied).

Ever since *McCulloch* and *Gibbons*, if a state action was seen to be incompatible with any legitimate exercise of power by the federal government, it lost all claim to validity--and this is true even though the state action in question was taken within a sphere in which the states could otherwise act. *Free v. Bland* (1962) 369 U.S. 663, 666, 8 L.Ed.2d 180, 82 S.Ct. 1089; *Franklin Nat. Bank v. New York* (1954) 347 U.S. 373, 379, 98 L.Ed. 767, 774, 74 S.Ct. 550; *Wissner v. Wissner* (1950) 338 U.S. 665, 94 L.Ed. 424, 70 S.Ct. 398; *Sola Electric Co. v. Jefferson Electric Co.* (1942) 317 U.S. 173, 176, 87 L.Ed. 165, 168, 63 S.Ct. 172.

McCarty makes it plain California's purported action determining that military retirement pay was community property and subject to division in a dissolution proceeding was void as an unconstitutional infringement of the Supremacy Clause. This decision also encompassed military disability retirement pay. Congress in the FSPA did not waive federal preemption as concerns military disability retirement pay. See 10 U.S.C. § 1408(a)(4). Lacking the power to so determine and divide, the judgment entered in the trial court, insofar as it purports to declare the Husband's military disability retirement pay to be community property and to divide it between the parties, is void since the ability of the state to hear and determine such a matter was lacking. *McCulloch v. Maryland, supra; Gibbons v. Ogden, supra; Fidelity Federal Savings and Loan Association v. de la Cuesta* (1982) ____ U.S. ____, 73 L Ed.2d 664, 102 S.Ct. 3014; and *New Mexico v. Mescalero Apache Tribe, supra.*

Even since the *McCarty* decision, the invalidity of state action when contrary to the Supremacy Clause of the U.S. Constitution has been repeatedly reaffirmed by the U.S. Supreme Court.

In *Blum v. Bacon* (1982) 457 U.S. 132, 72 L.Ed.2d 728, 102 S.Ct. 2355, the U.S. Supreme Court dealt with a case involving the application of laws passed by the State of New York excluding public assistance recipients from reimbursement for lost or stolen grants which statute conflicted with regulations issued by the Secretary of Health, Education and Welfare pursuant to the provisions of Title IV-A of the Social Security Act, 42 U.S.C. § 603(a)(5). The Court concluded that because of the conflict, New York's law was "invalid." *Id.* at 72 L.Ed.2d 738, 739, citing *Chrysler v. Brown* (1979) 441 U.S. 281, 295-296, 60 L.Ed.2d 208, 99 S.Ct. 1705.

More recently, in *Fidelity Federal Savings and Loan Association v. de la Cuesta* (1982) ____ U.S. ____, 73 L.Ed.2d 664, 102 S.Ct. 3014, a case involving a conflict with the law of the State of California enunciated in *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, and regulations issued by the Federal Home Loan Bank Board pursuant to the Home Owners Loan Act of 1933, this Court ruled that:

> "Even where Congress has not completely displaced state regulation in a specific area, *state law is nullified to the extent that it actually conflicts with federal law.* Such conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), *or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Jones v. Rath Packing Co.*, 430 U.S., at 526; *Bethlehem Steel Co. v. New York Labor Relations Bd.*, 330 U.S. 767, 773 (1947). These principles are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the

> Framers of our Constitution provided that the federal law must prevail.' *Free v. Bland*, 369 U.S. 663, 666 (1962); see also *Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981)." (Emphasis supplied.) *Id.* 73 L.Ed.2d at 675.

This Court concluded the Federal Home Loan Bank Board regulations preempted the due on sale restrictions of the California Supreme Court's *Wellenkamp* doctrine and barred application of the *Wellenkamp* rules to federal savings and loan associations.

As recently as June 13, 1983, this Court held that federal preemption means a state is *without jurisdiction* to act in the preempted area. In *New Mexico v. Mescalero Apache Tribe* (1983) ____ U.S. ____, 76 L.Ed.2d 611, 103 S.Ct. 2378, the Court dealt with a collision between New Mexico hunting and fishing regulations and Indian tribe regulations on the same subject. In holding that the state laws had been preempted, the Court said a state will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption (76 L.Ed.2d at 620); further, that state jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law (76 L.Ed.2d at 620).

One hundred sixty-four years plus of constitutional history teaches that federal preemption deprives state courts of subject matter jurisdiction, thus, the judgment entered in this case is void and is subject to collateral attack. See *Kalb v. Fuerstein* (1940) 308 U.S. 433, 84 L.Ed. 370, 60 S.Ct. 343.

In *In re Marriage of Fithian, supra*, the California Supreme Court expressly addressed the contention that state action regarding military retirement pay was barred by the Supremacy Clause of the United States Constitution, and clearly recognized that if there was a conflict with the Supremacy Clause the state law must yield. *Fithian, supra*, at 596, 597.

It is now plain, the acts of the California courts in purporting to declare the Husband's military disability retirement pay to be community property and purporting to divide it between spouses in a dissolution

action conflict with the Supremacy Clause of the Constitution of the United States, and with the provisions of express federal law, *i.e.* 10 U.S.C. § 1201, and 10 U.S.C. § 1408(a)(4). Therefore, the decisions of California courts implementing the rules of *Fithian* and *Stenquist* were and are void, invalid, and of no legal effect. California simply had no subject matter jurisdiction over the Husband's disability retirement pay. This Court should so declare.

THE DECISION OF THE UNITED STATES SUPREME COURT IN *McCARTY V. McCARTY, SUPRA*, IS ENTITLED TO RETROACTIVE EFFECT, INSOFAR AS THAT DECISION IS APPLICABLE TO DISABILITY RETIREMENT PAY OF DISABILITY RETIREES OF THE ARMED FORCES OF THE UNITED STATES

The California Appellate Courts have said "a decision should not be applied retroactively where a final judgment has rendered on the issue." *In re Marriage of Fellers* (1981) 125 Cal.App.3d 254, 256; *In re Marriage of Sheldon, supra*, and *In re Marriage of Mahone, supra*. None of these California appellate court decisions considered the effect of preemption nor the fact California law declaring military retired pay in general to be community property was void by reason of conflict with the Supremacy Clause of the U.S. Constitution. The Court below at 145 Cal.App.3d 433-435, inclusive, recognized the principal, but concluded there was no violation of the Supremacy Clause. *Id.* at 145 Cal.App.3d 435. In the context of this case, Husband does not concede *McCarty* is not entitled to retroactive effect.

In denying retroactive effect to *McCarty*, the *Sheldon* and *Fellers* courts rely upon a series of cited U.S. Supreme Court decisions. *Fellers* cites, without analysis, *Linkletter v. Walker* (1965) 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731; *Chicot Co. Drainage Dist. v. Baxter State Bank* (1940) 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317; and *James v. United States* (1961) 366 U.S. 213, 6 L.Ed.2d 246, 81 S.Ct. 1052. *Sheldon* cites *England v. Medical Examiners* (1964) 375 U.S. 411, 1 L.Ed.2d 440,

84 S.Ct. 461; *Linkletter v. Walker, supra; Stovall v. Denno* (1967) 388 U.S. 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967; and *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349. *Sheldon* quotes from *Chevron Oil Co. v. Huson, supra*, hereinafter "*Huson*."

It must also be noted, specifically, that none of the cases cited and relied upon by the *Sheldon* and *Fellers* courts, nor any of the cases cited in *Huson*, involve a case where the doctrine of federal preemption was relied upon to overturn state action, as was the case in *Kalb v. Feuerstein* (1940) 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370. Neither do any of the decisions relied upon in *Sheldon* and *Fellers* ignore or refuse to give effect to the intent of Congress. Where applicable, the opposite is the case. See *Chevron Oil Co. v. Huson, supra*, 404 U.S. 97, 102-103.

The intent and policy of Congress, prior to enactment of the FSPA, that military retired pay is the personal entitlement of the service member, 69 L.Ed.2d at 602; and that it actually reach the beneficiary, 69 L.Ed.2d at 603, cannot now be denied. One of the major purposes of Congress in establishing the military retirement system was to provide for the retired service member. 69 L.Ed.2d at 606. Cf. Report of the Subcommittee on Investigations, *supra*, at p. 19. The FSPA in 10 U.S.C. § 1408(a)(4) clearly reflects the continuing Congressional intent that military disability retirement pay is not to be divided by state action.

Retroactivity is not denied when to do so operates to frustrate Congressional intent. Indeed, as *Huson*, shows us, it will be denied when to do so will frustrate the intent of Congress. *Id.*, 404 U.S. 97, 102-103.

In another context, this Court has noted:

> "It is a familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules." *Sola Electric Co. v. Jefferson Electric Co.* (1942) 317 U.S. 173, 176, 87 L.Ed. 165, 168, 63 S.Ct. 172.

Later in the same opinion, the Court noted:

> "The federal courts have been consistent in holding that local rules of estoppel will not be permitted to thwart the purposes of statutes of the United States." 317 U.S. at 176, 87 L.Ed. at 168.

These observations are reinforced by the later decision of this Court speaking in *Ridgway v. Ridgway* (1981) 454 U.S. 46, 70 L.Ed.2d 39, 102 S.Ct. 49, and the statement in that decision that:

> "Notwithstanding the limited application of federal law in the field of domestic relations generally, . . . this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights. [Citing cases.]" 454 U.S. 46 at 54.

Ridgway clearly declares the operation of state law will not be permitted to prevent the frustration and erosions of the Congressional policy embodied in federal rights. The Court specifically noted that "*a state divorce decree*, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting Federal enactments," citing *McCarty v. McCarty, supra; Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 59 L.Ed.2d 1, 99 S.Ct. 802. See *Ridgway v. Ridgway, supra*, at 454 U.S. at 55 (emphasis added).

The *Mahone, Fellers* and *Sheldon* cases hold that principles of *res judicata* preclude giving retroactive effect to *McCarty* so as to overturn cases long since final. The holdings of *Mahone, Fellers* and *Sheldon* are to the effect that there can be no collateral attack of these "final" cases. Not so. Finality of state action does not preclude collateral attack when state action offends the Supremacy Clause.

For example, in *Kalb v. Feuerstein, supra*, a mortgagor-farmer had been determined liable in a foreclosure action successfully brought

against him in the state court. The state court action had become final and title was passed to new owners. The farmer turned to a federal court in a new action and collaterally attacked the state court judgment, arguing that federal law (the Bankruptcy Act), by which farmers were being granted a mortgage moratorium, preempted the state courts from exercising subject matter jurisdiction over the foreclosure and supported a collateral attack. In upholding this argument, the Supreme Court stated that:

> "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor . . . *and considerations as to whether the issue of jurisdiction was actually in the county court, or whether it could have been contested, are not applicable where the plenary power of Congress* over bankruptcy has been exercised. . . ." (Emphasis supplied.) 308 U.S. at 444.

The *Kalb* court declared state court judgments purporting to exercise jurisdiction over a preempted area of federal concern are *nullities and vulnerable to collateral attack.* See the court statement of the issues at 308 U.S. 436 and its holding at 308 U.S. 443, 444. Cf. *New Mexico v. Mescalero Apache Tribe* (1983) ____ U.S. ____, 76 L.Ed.2d 611, 103 U.S. 2378.

It is clear the decision of the Supreme Court of the United States in *McCarty v. McCarty, supra*, holding military retirement benefits are the personal entitlement of the military member and that they are not subject to being divided in a divorce proceeding for the reason that Congress clearly "intended that military retired pay actually reach the beneficiary" expresses "the congressional policy embodied in the federal rights." *Ridgway*, 70 L.Ed.2d at 47. This policy expression is reinforced by the FSPA provision excluding disability retired pay from the ambit of the FSPA. See 10 U.S.C. § 1408(a)(4). Under the circumstances, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal

enactments. *McCarty v. McCarty, supra; Hisquierdo v. Hisquierdo, supra.*" *Ridgway*, 70 L.Ed.2d at 48.

The holding of the California appellate courts that a decision of this Court declaring state action offensive to the Supremacy Clause of the federal constitution may not be applied to cases which have become final is a pernicious holding substantially weakening that constitutional bulwark we know as the Supremacy Clause. The California holdings additionally are contrary to the holdings of this Court concerning the Supremacy Clause dating from the 1819 decision in *McCulloch v. Maryland* to the effect that such offensive conduct by a state is void for lack of subject matter jurisdiciton, and that finality of state action does not preclude collateral attack when that state action offends the Supremacy Clause, *Kalb v. Feuerstein, supra*. These pernicious holdings by the California courts must be viewed for what they are, as an attack on the very substance of the Supremacy Clause of the Constitution of the United States. They may not stand. They must not stand.

CONGRESS DID NOT OVERRULE THE DECISION OF THE UNITED STATES SUPREME COURT IN *McCARTY V. McCARTY* SO AS TO PERMIT FSPA TO BE APPLIED RETROSPECTIVELY

The court below, at 145 Cal.App.3d 433, held that Congress in enacting the FSPA overrules *McCarty*. Other California courts have ruled similarly. See *In re Marriage of Sarles* (1983) 143 Cal.App.3d 24; *In re Marriage of Camp* (1983) 142 Cal.App.3d 217; *In re Marriage of Ankenman* (1983) 142 Cal.App.3d 833; *In re Marriage of Hopkins* (1983) 142 Cal.App.3d 530; *In re Marriage of Frederick* (1983) 141 Cal.App.3d 876; and *In re Marriage of Buikema* (1983) 139 Cal.App.3d 689. The discussion in *In re Marriage of Ankenman, supra*, clearly expresses the view of the California courts.

> ". . . the legislative history of the Uniformed Services Former Spouses Protection Act clearly indicates the

> intent of Congress 'to abrogate all applications of the *McCarty* decision (see J. Explanatory Statement of the Com. on Conf. on Pub.L. No. 97-252 from House Conf. Rep. No. 97-749, Aug. 16, 1982, pp. 166-168, Cong. Rec., vol. 128 (1982)).' (*In re Marriage of Buikema* (1983) 139 Cal.App.3d 689, 691 (188 Cal.Rptr. 856) (no petition for hearing filed in the Supreme Court).) '(T)he use of the date *McCarty* was decided as a reference in 10 United States Code section 1408(c)(1) . . . evidences a legislative intent that the law relative to community property treatment of military retirement pensions be as though *McCarty* did not exist, *i.e.*, that such pensions would be subject to division as community property before and after June 25, 1981.' (*In re Marriage of Frederick* (1983) 141 Cal.App.3d 876, 879, 190 Cal.Rptr. 588.) California law treating military retirement pensions as community property is no longer preempted." (*In re Marriage of Buikema, supra*, 139 Cal.App.3d at p. 691.)

Appellant submits these California courts are in error.

The Court will note none of these California decisions discuss the effect, if any, that should be given to § 1006(6) of the FSPA, Pub.L. 97-252 relative to 10 U.S.C. § 1408.

We should be clear that the effect, if any, of FSPA upon the *McCarty* decision is a federal, and not a state, question. *Adam v. Saenger* (1938) 303 U.S. 59, 64, 82 L.Ed. 649, 58 S.Ct. 454; *American Mannex Corp. v. Rozands* (5th Cir., 1972) 462 F.2d 688, 689. The California cases that analyze what effect will be given *McCarty* miss the point when they refer to state law to determine the issue. See, for example, *In re Marriage of Sheldon, supra*.

A.

THE FSPA OPERATES PROSPECTIVELY

The FSPA itself demonstrates it was intended to operate prospectively. It seems logical to start with the Act itself, but, unfortunately, no California court, so far, has deemed it an appropriate starting point.

10 U.S.C. § 1408(c)(1) of the FSPA commences with the phrase, "subject to the limitations of this section." That section states the first limitation immediately: "a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981" and then "only in accordance with the law of the jurisdiction of such court." See also the provisions of § 1006 of the FSPA (Pub.L. 97-252), relative to the effective dates of the FSPA. Subsection (a) states when the Act becomes effective, and subsections (b), (c) and (d), all of which "shall apply" only "on or after the effective date of" "this title."

The FSPA itself clearly indicates it is intended to operate prospectively, and, of course, this is understandable when the constitutional impediments to retrospective operation are considered. Congress may be assumed to know and to follow the law. If Congress had intended retrospective operation, they would have said so in clear language.

The principle is that statutes operate only prospectively, while judicial decisions generally operate retrospectively. *Union Pacific R. Co. v. Laramie Stock Yards Co.* (1913) 231 U.S. 190, 199, 58 L.Ed. 179, 182, 34 S.Ct. 101.

> "The presumption is very strong that a statute was *not* meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other." (Emphasis added.)

United States v. Schooner Peggy (1801) 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49, 51. *Bradley v. Richmond School Board* (1974) 416 U.S. 696, 711, 40 L.Ed.2d 476, 94 S.Ct. 2006.

> "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."

Id. at 416 U.S. 720. See *Green v. United States* (1964) 376 U.S. 149, 160, 11 L.Ed.2d 576, 84 S.Ct. 615.

A recent example of the application of the principle of prospective application only of statutes by this Court is found in *United States v. Security Industrial Bank* (1982) ____ U.S. ____, 74 L.Ed.2d 235, 103 S.Ct. 407. In that case, creditors had loaned debtors money and perfected liens on certain property held by the debtors. Subsequently, by amendment to the bankruptcy statutes, Congress exempted as property to be included in the debtors' bankruptcy estate the property subject to the liens. The Court of Appeals at 642 F.2d 1195 (1981), held that the Amendment to the Bankruptcy Act was retroactive, that is, that Congress intended to invalidate liens acquired before its enactment date. The Court of Appeals held, however, that such an application violates the Fifth Amendment since it effected a complete taking of the secured creditors' property interest.

The United States Supreme Court immediately perceived that retroactive destruction of the creditors' lien probably would not comport with the Fifth Amendment. It noted that a "taking is not limited to outright acquisitions *by the government for itself*. In other words, the destruction of one person's right for the benefit of another can be a "taking". In any event, the Supreme Court avoided a holding of unconstitutionality of the Bankruptcy Amendment by affording it prospective operation only.

Judicial proceedings cannot be validated by a curative statute in every instance where the court lacked jurisdiction. Congress is unable to breathe life into a proceeding where there is want of authority to act at all. *Turpin v. Lemon* (1902) 187 U.S. 51, 57, 47 L.Ed. 70, 23 S.Ct. 20. In sum, the period prior to February 1, 1983, cannot be interfered with

by Congress if it attempts to re-judicate rights and issues determined by *McCarty*.

B.

These California decisions, cited *supra*, at page 18, wholly overlook the effect of the Separation of Powers Doctrine. Although the Doctrine of Separation of Powers was not explicitly incorporated into the Constitution of the United States, it is there implicitly. The United States Supreme Court has said:

> "The doctrine of separation of powers is fundamental in our system. It arises, not from Article Three nor any other single provision of the Constitution, but because 'behind the words of the constitutional provisions are postulates which limit and control.' *Monaco v. Mississippi*, 292 U.S. 313, 323, 78 L.Ed. 1282, 1286, 54 S.Ct. 745."

The Doctrine of Separation of Powers was deemed necessary by the framers of the Constitution for two principal purposes: First, to protect the liberty of the citizen; and second, to safeguard the independence of each branch of the government and protect it from domination and interference by the others.

This Court has acknowledged that the Separation of Powers Doctrine protects the liberty of the citizen from a dangerous accumulation of power in those trusted to govern. It has observed:

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments--the legislative, the executive and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands." *O'Donoghue v. United States* (1933) 289 U.S. 516, 530, 77 L.Ed. 1356, 1360, 53 S.Ct. 740.

Later in that same opinion, the Court remarks concerning the Doctrine of Separation of Powers as follows:

> "James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' 1 Andrews, Works of James Wilson (1896) p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' 1 Story, Const. 4th ed. § 530. To the same effect, The Federalist (Madison) No. 48. And see *Massachusetts v. Mellon*, 262 U.S. 447, 488, 67 L.Ed. 1078, 1085, 43 S.Ct. 597." *O'Donoghue v. United States, supra*, at 289 U.S. 530, 531.

Simply put, Congress does not have the power to set aside, annul and overrule final judgments of the Courts of the United States. To do so offends the Doctrine of the Separation of powers. See *Hunter v. United States* (WDC, Mo., 1935) 10 F.Supp. 1014, 1015; *Personal Finance Co. of Braddock v. United States* (D.C. Del., 1949) 86 F.Supp. 779, 784; *Cerro Metal Products Co. v. Marshall* (D.C., E.D. Pa., 1979) 467 F.Supp. 869, 877, 878. The California Supreme Court, in the context of state action, recognizes this to be so. See *Mandel v. Meyers* (1981) 29 Cal.3d 531, 546, 547. The *Mandel* court quotes with approval the following explanation of the Supreme Judicial Court of Massachusetts speaking in *Denny v. Matoon* (1861) 84 Mass. (2 Allen) 361 [79 Am.Dec. 784]:

> "[i]t is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. . . . [A]n act of the legislature cannot set aside or annul final judgments or decrees. This is the highest exercise of judicial authority. . . . To vest in the legislature the power to take them away, or to impair their effect on the rights of parties, would be to deprive the judiciary of its most essential

> prerogative. . . . It is obvious that such an exercise of [legislative] authority would lead to the entire destruction of the order and harmony of our system of government and to a manifest infraction of one of its fundamental principles. Indeed, it is difficult to see how the legislature could more palpably invade the judicial department and effectively usurp its functions, than to pass statutes which should operate to set aside or annul judgments of courts in their nature final, and which would otherwise be conclusive on the rights of parties." (*Id.* at pp. 378-379.) 29 Cal.3d at 547, 548.

See also *Chadra v. Immigration and Naturalization Service* (9th Cir., 1980) 634 F.2d 408, *affirmed on appeal* (1983) ____ U.S. ____, 77 L.Ed.2d 317, 103 S.Ct. ____.

The conclusion is clear. Congress through FSPA may not operate retroactively, nor may it annul the effect of *McCarty v. McCarty* for the reason that the doctrine of separation of powers precludes Congress from so doing. The California cases holding the FSPA overrules *McCarty* and renders it moot are contrary to the decisions of this Court. The California decisions overlook and render meaningless the Doctrine of Separation of Powers. They cannot and ought not stand. It is necessary for this Court to hear this case and to reiterate not only that the Doctrine of the Separation of Powers lives, but that FSPA operates prospectively, not retroactively.

CONCLUSION

For the reasons stated above, this honorable Court should grant the Petition for Writ of Certiorari. It is necessary so the question of whether § 1408(a)(4) of the FSPA (10 U.S.C. § 1408(a)(4)) expresses the intent of Congress to continue federal preemption with respect to military disability retirement pay, and whether the various states now have the power (jurisdiction) to divide, as property, military disability retirement pay in a dissolution of marriage proceeding between the disabled military retiree and his spouse.

Subsumed within the above issue is the attempt by California courts to refuse to apply this Court's decision in *McCarty v. McCarty* to cases which had become final before the decision in *McCarty*. California refuses to recognize that the action by its courts in areas preempted by federal law is wholly void, lacking in subject matter jurisdiction, and subject to collateral attack. By refusing to give effect to the *McCarty* decision and to the Supremacy Clause, California seeks to void *McCarty* and the preemption declared by that decision. This refusal constitutes a direct attack upon the Supremacy Clause of the Constitution of the United States and its effect upon the states. This attack and its weakening effect upon the Supremacy Clause cannot be permitted to stand unchallenged.

Also, subsumed within the major issue presented, is the contention of the California courts that FSPA, enacted subsequent to the commencement of this appeal, has overruled *McCarty*, and was intended "To abrogate all applications of the *McCarty* decision," and that 10 U.S.C. § 1408(c)(1)

> ". . . evidences a legislative intent that the law relative to community property treatment of military retirement pensions be as though McCarty did not exist, *i.e.* that such pensions would be subject to division as community property before and after June 25, 1981." *In re Marriage of Ankenman, supra*, at 142 Cal.App.3d 837. See also *In re Marriage of Frederick, supra*, at 141 Cal.App.3d 879.

These decisions fail to give prospective effect only to FSPA. FSPA clearly was intended to operate prospectively. And, of course, the California courts fail to give credence to the Separation of Powers Doctrine.

The interpretation of the retrospective versus prospective operation of FSPA is an important question concerning the interpretation and effect of an important federal statute and should be decided. Further, the question of whether Congress can "overrule" and thus vitiate a decision of this Court, despite the Separation of Powers Doctrine, presents a serious constitutional issue which needs to be decided.

California courts, speaking in *In re Marriage of Jacanin* (1981) 124 Cal.App.3d 67, have expressed their view of this Court's wisdom in deciding *McCarty v. McCarty*. To date, California courts, have successfully emasculated *McCarty*. The question is whether California, or any other state, will be permitted to do so.

DATED: _____

HUNTER & RYAN

By: DANIEL B. HUNTER

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APPENDICES

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FILED

22 MAY 1974

BY J. F. Buckley Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

RICHARD WILLIAM STENQUIST, Petitioner, and MARILYN BETTY STENQUIST, Respondent.	NO. D 71705 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing on January 4,1974, in Department 21 before the Honorable Louis M. Welsh, Petitioner RICHARD WILLIAM STENQUIST appearing in person and by and through his attorney Robert F. Gusky, and the Respondent MARILYN BETTY STENQUIST appearing in person and by and through her attorneys, Rand and Day by Roland B. Day, and the Court having taken certain evidence and having continued the matter to February 1, 1974, for the taking of further evidence, and having concluded the trial of said cause that day, and having issued its Memorandum of Intended Decision dated February 6, 1974, the Court now issues its Findings of Fact and Conclusions of Law as set forth hereafter.

FINDINGS OF FACT

1. The parties hereto were marred on September 11, 1950, in Pasadena, California, and were separated on or about April 25, 1973.

2. There are three children of this marriage, to wit: BRADLEY R. STENQUIST, born July 6, 1953, adult, JEFFREY A. STENQUIST, born November 21, 1954, adult, and LORI A. STENQUIST, born November 29, 1957, sixteen years of age.

3. There have arisen between the parties irreconcilable differences, which have led to the irremediable breakdown of the marriage.

4. Counseling would not help to save the marriage.

5. Each of the parties has been a resident of the State of California for at least six months, of the County of San Diego for at least three months, immediately preceding the filing of the Petitioner's Petition.

6. Petitioner entered the United States Army on October 21, 1944, and was placed on the retirement list on July 1, 1970, being given credit for total service of twenty-five years, eight months and ten days continuously since October 1, 1944, more fully described in Exhibit "A" attached hereto.

7. On May 22, 1953, Petitioner was wounded in a training exercise by shell fragments, resulting in the amputation of his left forearm.

8. Petitioner, by signing a Request For Retention Of Active Duty, was thereafter allowed to continue on active duty status for the entire balance of his service career.

9. Petitioner, in the year 1970, voluntarily gave notice of his intention to retire from the military service and was thereafter determined to have a physical disability of eighty percent (80%).

10. The Court finds that as of July 1, 1970, petitioner had sufficient time on active duty to retire with "regular retirement pay" as the result of his longevity in service, but instead was retired on disability retirement pay. That said disability retirement pay is calculated on the basis of a maximum of seventy-five percent (75%) of the basic pay of the grade on which retired pay is allowable, which maximum is being paid to petitioner. Had petitioner retired for longevity instead of for disability, he would have been entitled to receive sixty-five percent (65%) of his final

active duty pay due to his length of service. Said disability retirement pay is based on the disability resulting from the loss of his arm, as aforementioned, in 1953.

11. The Court expressly finds that notwithstanding the finding of disability as to the petitioner, that the loss of his arm did not prevent him from successfully pursuing his service career for over seventeen (17) years following the loss of said arm, during which time he rose to the rank of Lt. Colonel, his retirement status.

12. At the time of petitioner's retirement from the United States Army, he was forty-three (43) years of age, having been born June 13, 1927.

13. Petitioner is now age forty-six (46), as is the respondent wife.

14. Petitioner husband has been a resident of the State of California permanently since birth, and the Respondent has had such status since she was an infant of age three (3) or four (4). The parties have always maintained California as their residence and have constantly voted here. Petitioner was stationed at Fort Ord, California, and the parties actually resided within California at the time of the husband's retirement from the service, as of July 1, 1970.

15. The petitioner turned down a proposed command assignment with the Army shortly before his retirement. Such rejection of command by him probably would have resulted in his being "passed over" for promotion.

16. Petitioner's present disability retirement pay is in the sum of $1,284.95, all of which is tax free.

17. Had the petitioner retired due simply to the longevity in the service his pay would be subject to federal and state income tax and would be in the approximate present sum of $1,113.66 (being the difference between seventy-five percent (75%) maximum disability pay which the petitioner is receiving, and the approximately sixty-five percent (65%) which he would be receiving pursuant to longevity had he not retired on disability).

18. The ratio of that portion of the marriage from the commencement thereof up until the time of the petitioner's retirement from military service, as compared with the entire total service of twenty-five years, eight months and ten days with which petitioner was credited, is seventy-seven percent (77%). The Court therefore finds that had the petitioner retired on longevity retirement pay, the respondent would be entitled to 38.5% of such pay, as a division of community property, such percentage representing fifty percent (50%) of the amount of such retirement accumulated during coverture.

19. The Court further finds that under the circumstances of this case, considering the fact that the disability did not in fact prevent the Petitioner from successfully completing his military career, the fact that the Petitioner did not elect to take his disability in 1953, which he could have done, and to find other employment, under which other or different rights may have inured to the parties hereto, and further under the general equitable powers of the Court, that the difference in pay between what the Petitioner would have received had he retired on straight retirement for years, and the disability pay which he is actually receiving, is the sole and separate property of the husband, while said lesser sum is community property, as accumulated during coverture.

20. Pursuant thereto, the Court finds that 65/75ths (86.66%) of the disability retirement pay being received by the Petitioner would be community property to the extent the same was accrued during coverture, and that 77% thereof was so accrued during coverture, hence, 66.73% of said disability retirement pay is community property and one-half thereof (33.36%, rounded off to 33⅓% for convenience, by stipulation) is respondent's share. (86.66% x 77% ÷ 2 = 33⅓%)

21. The Court finds that the Respondent is possessed of approximately $38,000.00 in value of separate assets.

22. The Respondent is presently employed on a part-time basis as an inexperienced real estate saleswoman, since about July, 1973, and has been receiving approximately $100.00 per month gross compensation therefrom, subject to various expenses.

23. In addition to the Respondent's nominal income from employment and a return on her separate property, the Respondent presently has a need for approximately $250.00 per month for her support and maintenance.

24. Pursuant to the stipulation of the parties, the custody of the minor child LORI should be awarded to the Respondent, with rights of reasonable visitation being awarded to the Petitioner.

25. Under all of the circumstances, there is a need for total child support for the daughter LORI in the approximate amount of $250.00 per month.

26. The Petitioner husband has the present ability to pay the aforementioned $250.00 needed by the Respondent and also the same sum as needed by the daughter of the parties, whether by way of support or by way of partial support and a division of the disability retirement pay being received by him as community property.

27. There exists the following items of community property, with the present fair market values of the same found to be as set forth hereafter, where relevant:

A.	Residential real property at 12941 Abra Drive, San Diego, California (which the Court finds to be unnecessary for the continued maintenance of the Respondent and the minor daughter and which, according to stipulation of the parties, should be sold).	
B.	Value Line stock	$ 130.00
C.	Holiday Magic Investment	8,143.28
D.	Cash value of insurance	1,590.00
E.	Fort Knox Bank Account	400.00
F.	Palomar Savings Account	13,737.36
G.	UCB Savings Account	150.00
H.	1969 Ford Station Wagon, (used by the respondent)	1,000.00
I.	1970 Pinto automobile, (used by petitioner)	1,500.00

J. Furniture and Furnishings, which by stipulation should go to the respondent, being those items set forth on the first two pages of furniture descriptions of the furniture appraisal of Murray Allison, (attached hereto as Exhibit "B"), including sewing machine and cabinet but otherwise excepting those items set forth in the bedrooms of the sons and daughter of the parties. (The Court finds that insofar as such "net" figures represent the price which would have to reasonably be paid to acquire such items, and that said items could be sold for only much less, that the fair market value of said items is 75% of the appraised "net" value, said net value being $4,981.50, plus sewing machine at $75.00) $3,811.13

K. Furniture and furnishings which by stipulation are to be awarded to the husband.

Two pine trees in pots	$ 37.50
Ammunition reloading tools	27.75
Skill saw	12.00
Gun cabinet	112.50
Stereo radio	100.00
Brass table	40.00
Plant in habachi and pot	30.00

Total value of furniture and furnishings to be awarded to petitioner 359.75

L. The Court further finds that all of the following property is community property and should be held hereafter by the parties as tenants in common, to be disposed of as they mutually agree: One rug, two suitcases, camel saddle and desk lamp, which are both presently in petitioner's possession, fishing gear, work bench, men's golf clubs, two outdoor camp lights, camp stove, two tents, and desk and chair (all appearing on the last page of the aforementioned appraisal), as well as all furniture and furnishings as listed on said appraisal appearing under the caption therein "BEDROOM OF SON - JEFFREY", "BEDROOM OF SON - BRADLEY", and "BEDROOM OF DAUGHTER - LORI", (except sewing machine and cabinet) and note from son, Bradley, of approximately $433.50.

28. The Court finds that pursuant to the aforementioned furniture appraisal, that appraiser's fees have been incurred thereto which are presently in dispute. The reasonable cost of said appraisal should be borne equally by the parties hereto, insofar as each has derived benefit therefrom. Further, the Court finds that attorney Roland B. Day has already advanced $125.00 towards the payment of such appraiser's fees, and that the parties should equally reimburse said attorney for such costs.

29. The Court finds that under all of the circumstances of this cause, that the Court should retain jurisdiction over the matter of the respondent's spousal support payable by the petitioner, and that the sum of $1.00 per month, payable on the first day of each month, beginning the first day of March, 1974, and continuing thereafter for a period of twenty-four (24) months, would be reasonable, the Court to reserve jurisdiction to alter, modify, or terminate the same upon good cause first being shown.

30. Based on statements made by the respective attorneys for the parties hereto, the Court finds that there is a strong likelihood that there may be an appeal from any decision which this Court makes and based on such finding and upon the further express stipulation of the parties in open Court through their respective attorneys that the Court may consider the award of interim support different from that which it would otherwise award, in the event of an appeal, all to make unnecessary further motions for such support in the event of appeal, the Court finds that in the event of an appeal only, that the Petitioner has the ability to pay, and need on behalf of the Respondent and the minor daughter, LORI, is shown, for spousal support in the sum of $250.00 per month, and child support in the sum of $250.00 per month, each of which shall be due and owing by Petitioner to Respondent as of February 1, 1974, and continuing until the judgment in this action is final or until said sums are otherwise modified.

31. In reference to the aforementioned finding that one-third (⅓) of the disability retirement pay received by the Petitioner is the community

property interest therein of the wife, said sum which is presently $428.33, is due and payable by Petitioner to Respondent as of the first of each and every month commencing February 1, 1974, and continuing during the joint lives of the parties.

32. In the event of an appeal, and in the further event that the total "interim support" of $500.00 per month is paid by Petitioner to the Respondent, all sums paid towards the wife's spousal support excepting $1.00 per month ($249.00 per month) and $150.00 of the $250.00 "interim support" for the daughter, or a total of $399.00 per month, should be a credit against the aforementioned obligation of the Petitioner to pay to the wife her community property interest in the disability retirement pay as found herein, if in fact such finding is either sustained on appeal, or that some other proportion of said pay is found to be community property, or in the event of abandonment of any appeal or other resolution thereof.

33. The Court finds that there probably exists additional community property herein including interest accumulations on various bank accounts as described above, which may have accrued since about May 5, 1973, the date of the petitioner's Financial Declaration, in which certain of said sums are described. Any additional community property of any kind, including but not limited to such interest, and an obligation from the son of the parties, BRADLEY R. STENQUIST, in the approximate sum of $433.50, is owned by the parties jointly.

34. The Court finds that each of the parties hereto is able to pay their own attorneys' fees and costs herein, and that neither has need for the other to pay the same.

35. Pursuant to stipulation of the parties, the respondent in her capacity as a real estate agent, shall be permitted to list and attempt to sell the family home, and any commission which she earns as derived therefrom shall be split between the parties, two-thirds to the respondent and one-third to the petitioner.

36. The Court finds that due to the executory matters involved in this cause, that it would be in the best interests of the parties if the Court were to keep jurisdiction to make any and all necessary and reasonable orders to carry out the Court's judgment herein.

CONCLUSIONS OF LAW

Based on the Findings Of Fact herein, the Court makes the following Conclusions Of Law:

1. The marriage of the parties should be dissolved.

2. The care, custody and control of the minor child, LORI A. STENQUIST, born November 29, 1957, should be awarded to the respondent, with rights of reasonable visitation awarded to the petitioner.

3. For reasons referred to in the Findings Of Fact herein, two-thirds of the disability retirement pay received by the petitioner is community property and one-half thereof, or one-third of said total sum which is presently in the amount of $1,284.95, being $428.30, is the wife's share thereof and she is entitled to one-third of all of said disability retirement payments, commencing February 1, 1974, and continuing each and every month during the joint lives of the parties. In the event that the wife predeceases the petitioner husband, the husband shall be entitled to all of said disability retirement as his sole and separate property.

4. Respondent's said share shall be one-third of whatever gross monthly benefits are hereafter due petitioner based on his service heretofore, whether such benefits are increased or decreased due to "cost of living" increases or otherwise, and in whatever form such benefits may later take. Specifically, should there be a change in the form of said benefits by legislation or any action by the petitioner or otherwise, respondent shall still own as her property, and be entitled thereto, a one-third interest in those benefits due petitioner based on his government service heretofore, regardless of the name or form of such benefits.

The Court should retain jurisdiction to interpret this provision and to adjudicate any disputes or controversies pursuant thereto.

5. The petitioner should be ordered to pay monthly to the respondent the aforementioned one-third of the disability retirement pay in whatever form or amount the same may be hereafter.

6. As to the following additional items of community property, judgment pertaining thereto should be made as follows:

A. The real property of the parties should be sold, with the respondent attempting to list and sell the same, and the net proceeds thereof divided equally between the parties. Respondent is entitled to two-thirds of any commission which she earns pursuant thereto, and the petitioner is entitled to one-third thereof.

B. The Holiday Magic Investment should be divided equally between the parties to be held between them as tenants in common, as should all furniture and furnishings referred to in subdivision L. of Paragraph 27 of the Findings Of Fact herein.

C. The petitioner should be awarded as his sole and separate property those items of property with the values as set forth hereafter:

1.)	Those items of furniture and furnishings set forth in sub-division K. of Paragraph 27 of the Findings Of Fact herein	$ 359.75
2.)	1970 Pinto automobile	$1,500.00
3.)	Value Line Stock	$ 130.00
4.)	Cash value of insurance	$1,590.00
5.)	Fort Knox Bank Account	$ 400.00

D. The respondent should be awarded as her sole and separate property the following:

1.)	The balance of the community property furniture not otherwise disposed of, all as described more specifically in the Findings Of Fact herein and the appraisal as referred to	$3,811.13
2.)	1969 Ford Stationwagon	$1,000.00

E. Of the total of the Palomar Savings and UCB Savings, of $13,887.36, plus any accumulated interest referred to hereafter,

in order to effect an even division of property, the petitioner is entitled first to $831.38 thereof, as his sole and separate property and the balance of $13,055.98 shall be divided equally between the parties, each thereby to receive as his or her respective separate property $6,527.99.

F. Any and all additional community property, including community property interest and any accumulations on the aforementioned bank accounts and insurance, as well as the obligation from the son of the parties, BRADLEY R. STENQUIST, shall be divided equally between the parties.

7. Each of the parties hereto should be ordered to make any necessary accountings, and sign any necessary documents and do any necessary acts to carry out all provisions of any Interlocutory Decree Of Dissolution entered herein, and the petitioner husband should be ordered to account directly to the respondent as to the status of the military retirement pay no less frequently than annually, and upon any change in said pay in any event.

8. Petitioner should be ordered to pay to the respondent the sum of $1.00 per month for spousal support, payable for a twenty-four month period commencing March 1, 1974, subject to the continuing jurisdiction of the Court to alter, modify, or terminate the same upon good cause first being shown.

9. Petitioner should be ordered to pay to respondent, as and for the support and maintenance of the minor daughter, LORI, the sum of $100.00 per month, commencing February 1, 1974, and continuing until said child reaches majority or is earlier married or otherwise emancipated, or until said order is modified by a Court of competent jurisdiction.

10. Each of the parties hereto should be ordered to pay their equal share of a reasonable appraisers fee for the appraisal of the furniture and furnishings herein, should equally reimburse to attorney ROLAND B. DAY the $125.00 which he has advanced towards the same, and should hold said attorney harmless from said fees.

11. Each of the parties hereto should be responsible for his or her own respective attorneys' fees and costs herein.

12. In order to avoid further litigation, including Court hearings, solely in the event of an appeal which would cause the petitioner not to pay to the respondent the one-third portion of the disability retirement pay heretofore held to be her sole and separate property and ordered payable to her, petitioner should be ordered to pay to the respondent spousal support in the sum of $250.00 per month, and child support for the daughter, LORI, in the sum of $250.00 per month, all commencing February 1, 1974, credit to be given for any payments of any kind which he has made, on a voluntary basis, commencing said date, and such orders for support and maintenance should continue until any judgment herein is final. Upon payment of said $500.00 in total support per month, petitioner would be entitled to credit for $399.00 per month, towards any obligation which may ultimately be found to exist, as to his duty to pay to the respondent any portion of the disability retirement pay if the same is determined to be community property, and said $100.00 monthly child support.

13. The Court should keep jurisdiction over all executory provisions of any Interlocutory Judgment Of Dissolution granted herein, in order to make any and all necessary and reasonable orders to carry out said judgment.

DATED: 22 MAY 1974

JUDGE OF THE SUPERIOR COURT

LOUIS M. WELSH

ROLAND B. DAY
RAND & DAY
Attorneys at Law
2120 Fourth Ave.
San Diego, Calif. 92101
232-5073

Attorneys for Respondent

Space Below For Use of Court Clerk Only

FILED

22 MAY 1974

By T. Bailey Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

In re the marriage of

Petitioner: RICHARD WILLIAM STENQUIST

and

Respondent: MARILYN BETTY STENQUIST

CASE NUMBER

D 71705

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceeding was heard on 1/4/74 and 2/1/74 before the Honorable LOUIS M. WELSH, Department No. 21, Findings Of Fact and Conclusions Of Law having been filed.

ENTERED

The court acquired jurisdiction of the respondent on 5/29/73 by:

MAY 22 1974
951 21
Judgment Book ____ Pg ____

☐ Service of process on that date, respondent not having appeared within the time permitted by law.

☐ Service of process on that date and respondent having appeared.

☒ Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive

this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

IT IS FURTHER ORDERED that the care, custody and control of the minor child, LORI A. STENQUIST, born November 29, 1957, is awarded to the respondent, with rights of reasonable visitation awarded to the petitioner.

IT IS FURTHER ORDERED that petitioner pay to the respondent, as and for her spousal support, the sum of $1.00 per month, payable for a period of twenty-four (24) months, commencing March 1, 1974, subject to the continuing jurisdiction of the Court to alter, modify, or terminate the same upon good cause first being shown.

IT IS FURTHER ORDERED that petitioner pay to the respondent, as and for the support and maintenance of the minor child of the parties, LORI, the sum of $100.00 per month, commencing February 1, 1974, and continuing on the 1st day of each and every month thereafter until said child reaches majority or is earlier married or otherwise emancipated, or until said order is modified by a Court of competent jurisdiction.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that one-third of the disability retirement pay received by the petitioner pursuant to his service with the United States Army is awarded to the respondent, MARILYN BETTY STENQUIST, as her sole and separate property, based on the Court finding that said one-third (rounded off from 33.36%) is her one-half of the community interest of said disability retirement pay which community interest the Court fixes at 66.73%.

Respondent's said share shall be one-third of whatever gross monthly benefits are hereafter due petitioner based on his service heretofore, whether such benefits are increased or decreased and in whatever form such benefits may later take.

This Court shall retain jurisdiction to interpret this provision and to adjudicate any disputes or controversies pursuant thereto.

IT IS FURTHER ORDERED that petitioner pay monthly to the respondent, commencing February 1, 1974, and continuing during the joint lives of the parties, one-third of the disability retirement pay to

which he is entitled, and one-third hereafter of such benefits in whatever amount the same shall be and notwithstanding any change in the form thereof.

IT IS FURTHER ORDERED that the real property of the parties located at 12941 Abra Drive, San Diego, California, is ordered to be sold with all reasonable speed, with the respondent attempting to list and sell the same, and the net proceeds thereof shall be divided equally between the parties. Respondent shall be entitled to two-thirds of any commission which she earns pursuant to said sale or listing, and the petitioner is entitled to one-third of said commission.

IT IS FURTHER ORDERED that the following property, being community property of the parties, shall be held by them hereafter, share and share alike, as tenants in common, subject to any further disposition that they may choose to make:

A. Holiday Magic Investment

B. Furniture and furnishings as follows: One rug, two suitcases, camel saddle and desk lamp, fishing gear, work bench, men's golf clubs, two outdoor camp lights, camp stove, two tents, desk and chair, as well as all furniture and furnishings as listed on that certain appraisal of Murray Allison on file herein, appearing under the caption in said appraisal "BEDROOM OF SON - JEFFREY", "BEDROOM OF SON - BRADLEY", and "BEDROOM OF DAUGHTER - LORI", expressly excepting the sewing machine and cabinet listed under the furniture of said daughter's bedroom.

IT IS FURTHER ORDERED that the petitioner is awarded as his sole and separate property the following:

A. Furniture and furnishings as follows: Two pine trees in posts, ammunition reloading tools, Skill saw, gun cabinet, Stereo radio, brass table, plant in habachi and pot.

B. 1970 Pinto automobile.

C. Value Line Stock.

D. Cash value of insurance in the approximate sum of $1,590.00.

E. Fort Knox Bank Account in the approximate sum of $400.00.

IT IS FURTHER ORDERED that the respondent is awarded as her sole and separate property the following:

A. All remaining furniture and furnishings of the parties being community property, except as otherwise disposed of above.

B. 1969 Ford Station Wagon.

IT IS FURTHER ORDERED that of the total of the Palomar Savings and UCB Savings, of $13,887.36, plus any accumulated interest since May 5, 1973, that in order to effect an even division of property, the petitioner is first entitled to withdraw therefrom the sum of $831.38 as his sole and separate property, and the balance thereof, being $13,055.98, plus any accumulations, shall be divided equally between the parties, each thereby to receive as his or her respective separate property interest therein the sum of $6,527.99, plus one-half of the accumulated interest, and the parties are ordered to disburse the same to themselves forthwith.

IT IS FURTHER ORDERED that any and all additional community property, including but not limited to additional interest and accumulations on bank accounts and insurance, as well as the obligation from the son of the parties, Bradley R. Stenquist, to the parties herein, in the approximate sum of $433.50, shall be divided equally between the parties and each is awarded a one-half interest therein.

Each of the parties hereto is ordered to pay one-half of a reasonable appraisers fee for the appraisal of the furniture and furnishings herein, and each shall equally reimburse to Attorney ROLAND B. DAY the $125.00 which he has heretofore advanced towards the same, and shall hold said attorney harmless from all of the appraisal fees as finally accrued therefor.

IT IS FURTHER ORDERED that each of the parties hereto shall be responsible for his or her own respective attorneys fees and costs herein.

IT IS FURTHER ORDERED that each of the parties hereto shall do any necessary acts, make any necessary accountings, and sign any necessary documents to carry out all of the provisions of this Interlocutory Judgment Of Dissolution Of Marriage, and the petitioner is expressly ordered to account directly to the respondent as to the status

of the disability retirement pay above referred to, regardless of the form or name such benefits may take hereafter, no less frequently than annually, and in any event upon any change in said pay or benefit.

In order to avoid possible further litigation regarding "pendente lite" support, and the parties hereto having expressly stipulated to the Court's jurisdiction to make the orders set forth hereafter, IT IS FURTHER ORDERED that only in the event of an appeal from this judgment which would abate petitioner's duty to pay to respondent the one-third share of the disability retirement benefits set forth above, that petitioner is ordered to pay to respondent, pending outcome of such appeal, spousal support in the sum of $250.00 per month, and child support for the daughter, LORI, in the sum of $250.00 per month, or a total of $500.00 per month, all commencing February 1, 1974, and continuing on the 1st day of each and every month thereafter until this or any further judgment herein becomes final. Credit shall be given for any payments of any kind which petitioner has made, on a voluntary basis, on or after February 1, 1974, and upon payment of said $500.00 in total support "pendente lite" per month, petitioner will be entitled to a credit for $399.00 per month, towards any obligation which he may ultimately be found to have, as to the above ordered spousal and child support and his duty to pay to respondent any portion of the disability retirement pay as above described if the same is determined to be community property in part.

IT IS FURTHER ORDERED that the Court expressly reserves jurisdiction over all executory provisions of this judgment, in order to make all reasonable and necessary orders to insure compliance therewith.

DATED: 22 MAY 1974

JUDGE OF THE SUPERIOR COURT

LOUIS M. WELSH

[L.A. No. 30718, Aug. 7, 1978.]

In re the Marriage of RICHARD WILLIAM and MARILYN BETTY STENQUIST.
RICHARD WILLIAM STENQUIST, Appellant, v.
MARILYN BETTY STENQUIST, Appellant.

SUMMARY

In a marriage dissolution proceeding, the trial court found that only the excess of the husband's military disability pension rights over the alternative retirement pension represented additional compensation attributable to the husband's disability, and that the balance of the pension rights acquired during marriage served to replace ordinary retirement pay, which it classified as a community asset to be divided equally. The trial court also limited its jurisdiction to modify spousal support to a period of 24 months. The record indicated that after 26 years of military service, the husband retired, electing to receive a disability pension of 75 percent of his basic pay in lieu of a retirement pension at 65 percent of basic pay. The husband had married six years after joining the army, and three years after his marriage he suffered a service-related injury leading to amputation of the left forearm. However, he chose to remain in the service for 17 more years. The record indicated that the couple had been married for 25 years and that although the wife had attempted to start work as a part-time real estate salesperson, as of trial she earned only $100 a month. (Superior Court of San Diego County, No. D 71705, Louis M. Welsh, Judge.)

The Supreme Court reversed the portion of the judgment limiting the court's jurisdiction to award spousal support, remanded for a reconsideration of the issue of spousal support, and affirmed the judgment in all other respects. The court held that the military disability pension's function of compensating the husband for loss of earning capacity or providing recompense for personal suffering was secondary to the primary objective of providing retirement support. Thus, it held that

[780] concerning the pension attributable to employment during the marriage, the trial court properly assigned as the husband's separate property only the excess of his pension over the retirement pension that he would have received if not disabled. Also, it held that, in light of the lengthy marriage and absence of evidence concerning future earnings and employment of the husband and wife, the trial court erred in limiting its jurisdiction to modify spousal support to a period of 24 months. (Opinion by Tobriner, J., with Bird, C. J., Mosk, Richardson and Manuel, JJ., and Jefferson, J.,* concurring. Separate dissenting opinion by Clark, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c) Dissolution of Marriage; Separation § 50—Division of Community and Quasi-community Property—Property Subject to Division—Military Disability Benefits.—In a marriage dissolution proceeding, the trial court properly found that only the excess of the husband's disability pension rights over the alternative retirement pension represented additional compensation attributable to the husband's disability, and thus properly ruled that the balance of the pension rights acquired during the marriage served to replace ordinary retirement pay and were subject to equal division as a community asset. The record indicated that the disability pension's function of compensating the husband for loss of earning capacity or providing recompense for personal suffering was secondary to the primary objective of providing retirement support. A serviceman may not defeat the community interest in his right to a pension based on longevity by election of a disability pension rather than a retirement pension. (Disapproving inconsistent language in *In re Marriage of Jones* (1975) 13 Cal.3d 457 [119 Cal.Rptr. 108, 531 P.2d 420], and *In re Marriage of Loehr* (1975) 13 Cal.3d 465 [119 Cal.Rptr. 113, 531 P.2d 425].)

[See **Cal.Jur.3d**, Family Law, § 419; **Am.Jur.2d**, Divorce and Separation, § 928.]

(2) Dissolution of Marriage; Separation § 50—Division of Community and Quasi-community Property—Property Subject to Division—

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*Assigned by the Chairperson of the Judicial Council.

Pension Benefits.—Pension benefits have become an increasingly **[781]** significant part of the consideration earned by an employee for his services. As the date of vesting and retirement approaches, the value of a pension right grows until it often represents the most important asset of the marital community. A division of community property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent the equal division of community property contemplated by the Family Law Act.

(3) **Dissolution of Marriage; Separation § 54—Division of Community and Quasi-community Property—Additional Award or Offset for Purpose of Restitution—Increase in Alimony.**—Adjustments in the amount of alimony awarded will not mitigate the hardship caused the wife by the denial of her community interest in pension benefits. Alimony lies within the discretion of the trial court and may be modified with changing circumstances, but the spouse should not be dependent on the discretion of the court to provide her with the equivalent of what should be hers as a matter of absolute right.

(4a, 4b) **Dissolution of Marriage; Separation § 67—Support of Other Party—Modification, Revocation and Extension—Jurisdiction—Termination at Future Date.**—In a marriage dissolution proceeding, the trial court abused its discretion by limiting its jurisdiction to modify spousal support to a period of 24 months. The record indicated that the parties had been married for 25 years, and that although the wife had started work as a part-time real estate salesperson, she had earned only $100 a month at the time of trial. Also, the record contained no evidence concerning future earnings and employment opportunities for either the husband or wife.

(5) **Dissolution of Marriage; Separation § 67—Support of Other Party—Modification, Revocation and Extension—Jurisdiction—Termination at Future Date—Lengthy Marriages.**—A court should not terminate jurisdiction to extend a future support order after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction. In making its decision concerning the retention of jurisdiction, the court must rely only on the evidence in the record and the reasonable inferences to be drawn from it. It must not engage in speculation. If the record does not contain evidence of the supported spouse's **[782]** ability to

meet his or her future needs, the court should not burn its bridges and fail to retain jurisdiction.

COUNSEL

Hervey, Mitchell, Ashworth & Keeney and Thomas Ashworth III for Appellant Husband.

Rand & Day and Roland B. Day for Appellant Wife.

Gertrude D. Chern as Amicus Curiae on behalf of Appellant Wife.

OPINION

TOBRINER, J.—Retiring after 26 years of military service, husband received a "disability" pension of 75 percent of his basic pay in lieu of a "retirement" pension at 65 percent of basic pay.[1] Although a military "retirement" pension is a community asset (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 604 [111 Cal.Rptr. 369, 517 P.2d 449]), husband claims that his entire "disability" pension is his separate property under our decision in *In re Marriage of Jones, supra*, 13 Cal.3d 457. Looking beneath the label of a "disability" pension, however, the trial court found that only the excess of the "disability" pension rights over the alternative "retirement" pension represented additional compensation attributable to husband's disability; the balance of the pension rights acquired during the marriage, it ruled, served to replace ordinary "retirement" pay and thus must be classed as a community asset.

We agree with the reasoning of the trial court; to permit the husband, by unilateral election of a "disability" pension, to "transmute community property into his own separate property" (*In re Marriage of Fithian, supra*, 10 Cal.3d 592, 602), is to negate the protective philosophy of the community property law as set out in previous decisions of this court. We therefore affirm the judgment of the trial court apportioning husband's **[783]** pension rights between separate and community assets and dividing the community interest equally between the spouses.

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[1]We used the labels "disability pay" and "retirement pay" in *In re Marriage of Jones* (1975) 13 Cal.3d 457, 460 [119 Cal.Rptr. 108, 531 P.2d 420]. Sections 1201 and 1401 of 10 United States Code, which govern military retirement benefits, speak only of "retired pay."

Turning to wife's cross-appeal, we explain that the trial court's order limiting its jurisdiction over spousal support to 24 months conflicts with the policy established in our recent decision of *In re Marriage of Morrison* (1978) 20 Cal.3d 437 [143 Cal.Rptr. 139, 573 P.2d 41]. Because any assertion that wife will attain economic self-sufficiency within 24 months of the judgment below rests on speculation, not evidence, the trial court's order divesting itself of the power to order spousal support beyond that brief period constitutes an abuse of discretion. We therefore reverse that portion of the trial court's order, remanding the matter for further proceedings in light of this opinion.

(1a) 1. *The trial court correctly apportioned husband's pension into community and separate assets.*

In the instant case the husband joined the Army in 1944 and married in 1950. In 1953 he suffered a service-related injury leading to amputation of his left forearm, for which the Army assigned him an 80 percent disability rating. If the husband had retired immediately, his maximum "disability" pay would have been 75 percent of basic pay, compared to a maximum "retirement" pay of 22½ percent of basic pay. He nevertheless continued his military service until he retired in 1970. At that time he faced the choice of taking regular "retirement" pay at the rate of 65 percent of his basic pay, or taking "disability" pay, a stipend equal to 75 percent of basic pay.[2] Assuming the husband desired the higher amount, the Army began making "disability" payments to him.

The husband commenced proceedings for dissolution of the marriage in 1974. The trial court first determined that all pension rights attributable to the husband's military service before marriage, plus the portion of those rights earned during marriage attributable to the husband's disability, constituted his separate property. It then ruled that that portion of the pension rights earned after the marriage equivalent to an ordinary retirement pension, computed on the basis of longevity of service and rank at retirement, constituted a community asset.

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[2]We note that if the husband had retired four years later, in 1974, both his maximum "disability" and his maximum "retirement" pay would have been 75 percent of his basic pay.

[784] The court finally divided this asset equally between the spouses.[3] The husband appeals from the portion of the judgment awarding his wife part of his pension as community property. The wife also appeals from the judgment below; challenging the court's apportionment, she claims that only that portion of the pension attributable to husband's employment before marriage is separate property.

We begin our discussion of this issue by reviewing the procedure by which a disabled serviceman may compute the amount of "retired pay" to which he is entitled. He may elect, first, to compute his "retired pay" on the basis of his rank and disability by multiplying his monthly basic pay by his percentage of disability. Alternatively, he can compute his "retired pay" on the basis of rank and longevity of service by multiplying his monthly basic pay by 2½ percent times his years of service. (10 U.S.C. § 1401.) Under either formula, he cannot receive more than 75 percent of his last monthly basic pay. The amount of retired pay the serviceman receives under either option therefore depends largely on his monthly pay at retirement, a function of longevity of service and rank; rank itself is closely related to length of service.

In *In re Marriage of Jones, supra*, 13 Cal.3d 457, and *In re Marriage of Loehr* (1975) 13 Cal.3d 465 [119 Cal.Rptr. 113, 531 P.2d 425], its companion memorandum decision, we held that a serviceman's right to "disability" pay, acquired before he had earned a "vested" right to ordinary retirement pay, was separate property. Subsequently in *In re Marriage of Brown* (1976) 15 Cal.3d 838 [126 Cal.Rptr. 633, 544 P.2d 561], we held that "vested" and "nonvested" pensin rights should be treated

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[3]The trial court held tht "[t]he ratio of that portion of the marriage from the commencement thereof up until the time of the petitioner's [husband's] retirement from military service, as compared with the entire total service of twenty-five years, eight months and ten days with which petitioner was credited, is seventy-seven percent (77%). The Court therefore finds that had the petitioner retired on longevity retirement pay, the respondent [wife] would be entitled to 38.5% of such pay, as a division of community property, such percentage representing fifty percent (50%) of the amount of such retirement accumulated during coverture . . . . [¶] The Court further finds that . . . the difference in pay between what the Petitioner would have received had he retired on straight retirement for years, and the disability pay which he is actually receiving, is the sole and separate property of the husband, while said lesser sum is community property, as accumulated during coverture. . . . [¶] Pursuant thereto, the Court finds that 65/75ths (86.66%) of the disability retirement pay being received by the Petitioner would be community property to the extent the same was accrued during coverture, and that 77% thereof was so accrued during coverture, hence, 66.73% of said disability retirement pay is community property and one-half thereof (33.36%, rounded off to 33⅓% for convenience, by stipulation) is respondent's share. (86.66% × 77% ÷ 2 = 33⅓%)."

alike. Relying on those decisions, the husband contends that all military **[785]** pensions based on disability are now separate property.[4] Closer examination, however, reveals that the reasoning of *Jones* and *Brown* supports the division of the husband's pension which the present trial court ordered.

In *Jones*, we held tht when a spouse is entitled to receive a pension only because he is disabled, and *has no right to a pension because of longevity of service*, the disability benefit payments are his separate property upon dissolution of the marriage. At the time *Jones* was decided, however, we deemed the community interest in a nonvested retirement pension a mere expectancy, and not a property interest. (See *French v. French* (1941) 17 Cal.2d 775 [112 P.2d 235, 134 A.L.R. 366].) Since Jones retired before his right to a "retirement" pension vested, his acceptance of "disability" pay did not affect any present community asset, but merely prevented an expectancy from coming into fruition. Recognizing, however, that the principles in *Jones* might not govern a case in which the serviceman had acquired a vested right to retired pay wholly apart from his disability, we expressly limited our decision to cases involving nonvested pensions.

One year following our decision in *Jones* we overturned past precedent and held in *In re Marriage of Brown, supra*, 15 Cal.3d 838, that pension rights, whether or not vested, constituted a property interest; that to the extent that such rights derive from employment during coverture, they now comprise community assets. This holding undermines the fundamental premise of *Jones*: that the award of a serviceman's "disability" pension to the serviceman as his separate property would not impair any community interest of his spouse. Under current law—in contrast to the law prevailing when *Jones* was decided—both the nonvested retirement pension in *Jones* and the husband's vested right to a "retirement" pension in the present case constitute valuable community assets deserving of judicial protection.

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[4]The wife on her part acknowledges that the trial court arrived at an equitable apportionment of the pension between separate and community interests. She argues, however, that the duty of making such apportionment imposes so great a burden on the courts that we should instead adopt a clear and simple rule that all "disability" payments, the right to which was earned during coverture, are community property. Rejecting this rigid rule and the contention that any other disposition of the issue causes complications, we point out that the method of apportionment adopted by the trial court, which we endorse, does not involve any delicate balancing of equities, but a simple mathematical computation based on the relationship of the "disability" pension to an alternative "retirement" pension. It does not impose a burden so heavy that for reasons of expediency we must settle for the less equitable, all-or-nothing rule wife proposes.

[786] Our reasoning in *Brown* is particularly appropriate to the present case. **(2)** As we stated there, "[o]ver the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community. . . . A division of community property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent that equal division of community property contemplated by [the Family Law Act]." (*In re Marriage of Brown, supra*, 15 Cal.3d 838, 847.)

(1b) We cannot permit the serviceman's election of a "disability" pension to defeat the community interest in his right to a pension based on longevity. In the first place, such a result would violate the settled principle tht one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse. (See *Waite v. Waite* (1972) 6 Cal.3d 461, 472 [99 Cal.Rptr. 325, 492 P.2d 13]; *In re Marriage of Peterson* (1974) 41 Cal.App.3d 642, 650-651 [115 Cal.Rptr. 184].)[5] As the court explained in *In re Marriage of Mueller* (1977) 70 Cal.App.3d 66 [137 Cal.Rptr. 129], a case indistinguishable from the present appeal, the employee spouse retains the right to determine the nature of the benefits to be received.[6] It would be inconsistent with community property principles "to permit that spouse to transmute what would otherwise be community property into his or her separate property." (70 Cal.App.3d at pp. 71-72.)[7]

In the second place, "only a portion of husband's pension benefit payments, though termed 'disability payments,' is properly allocable to

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[5]While in *In re Marriage of Brown, supra*, 15 Cal.3d 838, 851, footnote 14, we disapproved dicta in *Waite* and *Marriage of Peterson* to the effect that nonvested pension rights were not community property, we did not disapprove the holding in those cases that one spouse could not by election destroy the community interest of the other spouse.

[6]Recognition of the nonemployee spouse's interest in the "disability" pension would not limit the employee's freedom "to elect between alternative retirement programs." (*In re Marriage of Brown, supra*, 15 Cal.3d 838, 849.) Any serviceman eligible to receive "disability" payments higher than ordinary retirement benefits would remain free to elect the higher payments if he so chose.

[7]We note that the courts of Texas have held that if a serviceman surrenders a vested right to retirement benefits in order to obtain "disability" benefits, the "disability" benefits are community property. (See *Busby v. Busby* (Tex. 1970) 457 S.W.2d 551; *Dominey v. Dominey* (Tex.Civ.App. 1972) 481 S.W.2d 473, cert. den., 409 U.S. 1028 [34 L.Ed.2d 321, 93 S.Ct. 462].)

disability. It would be unjust to deprive wife of a valuable property right simply because a misleading label has been affixed to husband's pension [787] fund benefits." (3) (See fn. 8.) (*In re Marriage of Cavnar* (1976) 62 Cal.App.3d 660, 665 [133 Cal.Rptr. 267]; see Pattiz, *in a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans* (1978) 5 Pepperdine L.Rev. 191, 198 and cases there cited.)[8]

The purpose of disability benefits, as we explained in *Jones*, is primarily to compensate the disabled veteran for "the loss of earnings resulting from his compelled premature military retirement and from diminished ability to compete in the civilian job market" (13 Cal.3d at p. 459) and secondarily to compensate him for the personal suffering caused by the disability. Military retired pay based on disability, however, does not serve those purposes exclusively. Because it replaces a "retirement" pension, and is computed in part on the basis of longevity of service and rank at retirement, it also serves the objective of providing support for the serviceman and his spouse after he leaves the service. Moreover, as the veteran approaches normal retirement age, this latter purpose may become the predominate function served by the "disability" pension.

(1c) The present case illustrates the point. The husband here did not retire prematurely from military service to face the prospect of competing on the civilian labor market handicapped by his disability; he served for 26 years, retiring only after he had acquired a vested right to a "retirement" pension. He did not begin to receive his disability pension until 17 years after the injury. The value of his present "disability" pension depends largely on the high military rank he had achieved at the time of retirement and his extensive military service; it does not relate to his rank or longevity at the time of injury. Under these circumstances, the pension's function of compensating the husband for loss of earning capacity or providing recompense for personal suffering is secondary to the primary objective of providing retirement support.

The Court of Appeal in *In re Marriage of Mueller, supra*, 70 Cal.App.3d 66, explained the method of allocating a disability pension

[8]As we have affirmed many times, adjustments in the amount of alimony awarded will not mitigate the hardship caused the wife by the denial of her community interest in the pension payments. Alimony lies within the discretion of the trial court and may be modified with changing circumstances: "the spouse 'should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right.'" (*In re Marriage of Brown, supra*, 15 Cal.3d 838, 848.)

between the separate interest of the disabled spouse and the community **[788]** interest in the retirement benefits. It stated that "where the employee spouse elects to receive disability benefits in lieu of a matured right to retirement benefits, only the net amount thus received over and above what would have been received as retirement benefits constitutes compensation for personal anguish and loss of earning capacity and is, thus, the employee spouse's separate property. The amount received in lieu of matured retirement benefits remains community property subject to division on dissolution." (70 Cal.App.3d at p. 71.)[9]

The trial court in the present case correctly followed this formula. It first classified as separate property that portion of the husband's pension attributable to employment before marriage. Turning to the balance of the pension, it assigned as separate property only the excess of the husband's pension over the "retirement" pension that he would have received if not disabled; the remainder of the pension it divided as community property.[10] Finding this portion of the trial court's decision in accord with the principles stated in *In re Marriage of Mueller, supra*, 70

[9]Although the quoted language from *In re Marriage of Mueller* speaks of "matured" retirement benefits, the court earlier in its opinion made clear that matured benefits could not be distinguished from immature but vested benefits. Indeed in light of *In re Marriage of Brown, supra*, 15 Cal.3d 838, no distinction can be drawn between matured benefits and nonvested benefits.

[10]Contrary to the view advanced in the dissenting opinion, allocation of the "disability" pension between separate and community interests does not discriminate against the disabled. In attempting to demonstrate such discrimination, the dissent first describes a healthy worker who takes some action, such as terminating his employment before his pension vests or working beyond his retirement date, which has the effect of forfeiting all or part of his pension rights. In such a case, of course, the worker's spouse has no claim to any of the forfeited rights; a community share of nothing equals nothing. (See Reppy, *Community and Separate Interests in Pension and Social Security Benefits After Marriage of Brown and ERISA* (1978) 25 UCLA L.Rev. 417, 426, fn. 31.) The dissent then compares such a healthy worker to a disabled worker who retires and receives a "disability" pension, part of which under the present decision will be classified as community property. Because the spouse of the disabled worker can claim a share in his pension, the dissent concludes that the decision discriminates against the disabled.

The conclusion of the dissent, however, derives from the dissent's inappropriate comparison. If instead of comparing a healthy worker who has forfeited pension rights with a disabled worker receiving a pension, we compare healthy and disabled workers who are both receiving pensions, we discover that under the allocation formula set forth in this opinion the disabled worker usually will retain a higher percentage of the benefits. In the present case, for example, the husband's pension by virtue of his disability is higher than the "retirement" pension of a healthy serviceman of equivalent rank and longevity. Because we allocate to husband the whole of excess of his "disability" pensions over a "retirement" pension, he receives greater pension benefits than does the undisabled veteran.

[789] Cal.3d 68, and adopted in this opinion, we affirm its division of the marital property.[11]

(4a) 2. *The trial court abused its discretion by limiting its jurisdiction to modify spousal support to a period of 24 months.*

The trial court ordered husband to pay to wife "as and for her spousal support, the sum of $1.00 per month, payable for a period of twenty-four (24) months, commencing March 1, 1974, subject to the continuing jurisdiction of the Court to alter, modify, or terminate the same upon good cause first being shown." Wife does not challenge the amount of $1 per month, but contends that the 24-month limitation is an abuse of discretion.

Since the court's continuing jurisdiction is not expressly limited to the 24-month period, the order is not entirely clear on its face. The award of $1 per month alimony, however, serves to clarify the meaning of the order. That award plainly is not intended as genuine support for the wife, but to serve as a legal fiction demonstrating the continuing jurisdiction of the court over spousal support. By limiting the $1 per month payments to a period of 24 months, the court impliedly indicated that it did not intend to extend its jurisdiction to modify the award of spousal support beyond the 24-month period.

So interpreted, the trial court's award is inconsistent with our recent decision in *In re Marriage of Morrison, supra*, 20 Cal.3d 437. **(5)** We stated in *Morrison* that "A trial court should not terminate jurisdiction to extend a future support order after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction. In making its decision concerning the retention of jurisdiction, the court must rely only on the evidence in the record and the reasonable inferences to be drawn therefrom. It must not engage in speculation. If the record does not contain evidence of the supported spouse's ability to meet his or her future needs, the court should not 'burn its bridges' and fail to retain jurisdiction." (20 Cal.3d at p. 453.)

(4b) In the present case, the parties had been married for 25 years. Following retirement from the military, husband has not been employed. Wife attempted to start work as a part-time real estate salesperson, but as

[11]Language in *In re Marriage of Jones, supra*, 13 Cal.3d 457, and *In re Marriage of Loehr, supra*, 13 Cal.3d 465, inconsistent with this opinion, is disapproved.

of trial she earned only about $100 a month. As is so often the case, the **[790]** combined income of the parties is insufficient to meet the anticipated expenses of separate living.[12]

If the husband's military pension is divided as ordered by the trial court, husband and wife will have approximately equal monthly incomes; thus the award of only $1 per month in spousal support is not an abuse of discretion. Any attempt to predict conditions of two, five, or ten years hence, however, is a matter of total speculation. Husband may remain unemployed and totally dependent on his military pension; on the other hand his demonstrated talents may yield a well paying job. Wife may or may not succeed as a real estate salesperson.

• Both *In re Marriage of Morrison* and the Court of Appeal cases cited with approval in *Morrison* stress that decisions to terminate continuing jurisdiction cannot be based on speculation concerning future earnings and employment. Such decisions should instead be deferred until the realized facts demonstrate whether further support is warranted. As the Court of Appeal explained in *In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 738-739 [145 Cal.Rptr. 205]: "[B]y making an order terminating all spousal support . . . without reserving jurisdiction to extend the period, the court put it out of its power to provide any support whatever for wife after that time even if, after maximum effort on her part, she is unable to support herself in a reasonable fashion. There is no justification for the court so 'burning its bridges.'" (See also *In re Marriage of Andreen* (1978) 76 Cal.App.3d 667, 673 [143 Cal.Rptr. 94].)

We conclude that the trial court abused its discretion in divesting itself of jurisdiction to award spousal support 24 months after the date of the decree. Four years having passed since the trial court rendered its judgment, that court should now reconsider the issue of spousal support in light of the current income and earning potential of the parties, and frame its award in conformity with the principles outlined in this opinion and elucidated fully in *In re Marriage of Morrison, supra*, 20 Cal.3d 437.[13]

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[12]The record on appeal does not include a reporter's transcript of the brief testimony heard by the trial court. The arguments of the parties suggest that none of this testimony bore on the question of the wife's ability to attain economic self-sufficiency within a period of two years following the decree.

[13]Upon such reconsideration, the trial court may wish to reserve jurisdiction to award spousal support to the husband as well as to the wife if the economic prospects of the parties so warrant.

[791] 3. *Summary*

We conclude that military retired pay based on disability contains two components: (a) compensation to the serviceman for loss of earning power and personal suffering, and (b) retirement support. The latter component, to the extent that it is attributable to employment during marriage, is community property.[14] The trial court correctly followed this analysis in apportioning the husband's pension rights in the instant case. That court erred, however, in limiting its jurisdiction to award spousal support to the brief period of two years; it should have retained jurisdiction in order to be able to evaluate the parties' needs and capacities in light of future events.

The portion of the judgment limiting the court's jurisdiction to award spousal support is reversed and the cause remanded for further proceedings consistent with the views expressed herein. In all other respects the judgment is affirmed. Marilyn Stenquist shall recover her costs on this appeal.

Bird, C. J., Mosk, J., Richardson, J., Manuel, J., and Jefferson, J.,* concurred.

CLARK, J.—I dissent.

Retirement pensions earned during marriage constitute community property, and disability pensions—no matter when the disability occurs—constitute separate property. Under federal law, a veteran who has qualified for both may receive only one. Either the separate property interest or the community property interest must be sacrificed, and the question before us is whether upon dissolution a portion of the disability pension—equal to the amount of retirement pension earned during marriage—shall be held to be community property. On the basis of well-settled principles, authorities and reason set forth in *In re Marriage of Jones* (1975) 13 Cal.3d 457 [119 Cal.Rptr. 108, 531 P.2d 420], it must be concluded the disabled person upon dissolution is entitled to the future

[14]Following the policy of *In re Marriage of Brown, supra*, 15 Cal.3d 838, 851, our holding respecting the division of military "disability" pensions applies retroactively only to cases "in which the property rights arising from the marriage have not yet been adjudicated, to such rights if such adjudication is still subject to appellate review, or if in such adjudication the trial court has expressly reserved jurisdiction to divide pension rights."

*Assigned by the Chairperson of the Judicial Council.

[792] disability pension payments as separate property, with spousal support available to meet the needs of the nondisabled former spouse in appropriate cases.

To reach the result that part of the disability pension is community, the majority disapprove our recent unanimous decision in *Jones* (by the author of today's opinion), now implying that *Jones* was based on the overruled doctrine of *French v. French* (1941) 17 Cal.2d 775 [112 P.2d 235, 134 A.L.R. 366], which held that nonvested retirement pensions are mere expectancies. (*Ante*, p. 785.) The implication is false; *Jones* did not rely upon the doctrin eof *French*. Moreover, by repudiating *Jones*, the majority establish an invidious discrimination between disabled employees and healthy ones who terminate employment, a discrimination betraying a shocking lack of compassion for the handicapped.

FACTS

Husband entered the Army in 1944 and married in 1950. In 1953 he was injured by shell fragments, suffering amputation of his left forearm. Rather than exercising his right to disability compensation, he chose to remain on active duty.

When husband retired in 1970 at the age of 43, he possessed the options of regular retirement pay based on longevity of service equal to 65 percent of his basic pay, or disability compensation equal to 75 percent of his basic pay. Disability compensation is not subject to federal or state taxes. The Army assumed husband desired the higher amount and began making disability payments to him.

Husband commenced dissolution of the marriage in 1974. The trial court held the difference between *future* disability compensation and regular retirement benefits constitutes husband's separate property. A portion of the pension was attributed to husband's employment *prior* to marriage and was also held to be his separate property. The balance was attributed to employment during marriage and was held to be community property. The court awarded the wife half of all community assets, determined $38,000 was her separate property, granted child support and one dollar per month spousal support for two years.

Recognizing that retirement benefits are not gratuities but represent deferred compensation for past service, this court has held that anticipated future retirement payments attributable to employment during marriage constitute a community asset divisible upon dissolution. (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 841 et seq. [126 Cal.Rptr. 633, 544 P.2d 561]; *In re Marriage of Jones, supra*, 13 Cal.3d 457, 461; *Waite v. Waite* (1972) 6 Cal.3d 461, 471 [99 Cal.Rptr. 325, 492 P.2d 13]; *Phillipson v. Board of Administration* (1970) 3 Cal.3d 32 [89 Cal.Rptr. 61, 473 P.2d 765].) On this basis, future military retirement benefits have been held divisible as community property. (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 604 [111 Cal.Rptr. 369, 517 P.2d 449].) The retirement pension is divisible whether vested or nonvested. (*In re Marriage of Brown, supra*, 15 Cal.3d 838, 843-850.) While nonvested pension rights may in theory be divided by determining the present value of the rights, their evaluation must take into account the possibility that death or termination of employment may destroy them before maturity. The uncertainties warrant refusal to divide present value and instead awarding a portion of each pension payment as it comes due. (*Id.*, at p. 848.)

Limitations on the applicability of community property principles to retirement pensions have also been established. Judicial recognition of the nonemployee spouse's interest in pension rights does not limit the employee's freedom to change or terminate his employment, to modify employment terms, including retirement benefits, or "to elect between alternative retirement programs.[12] . . . The employee retains the right to decide, and by his decision define, the nature of the retirement benefits owned by the community." (*In re Marriage of Brown, supra*, 15 Cal.3d 838, 849-850.) Unlike other community property interests, the nonemployee spouse's interests may not be devised or inherited. (*Waite v. Waite, supra*, 6 Cal.3d 461, 472-474.) And a provision in the employee benefit plan granting benefits to an employee's "widow" will be enforced to exclude benefits to a spouse married during the employment period where the marriage was dissolved and the employee remarried. (*Id.*, at p. 472, fn. 6; *Phillipson v. Board of Administration, supra*, 3 Cal.3d 32,

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"[12]In *Phillipson v. Board of Administration, supra*, 3 Cal.3d 32, the employee had absconded with most of the community assets; the trial court to equalize the division of community property awarded the spouse all of the employee's pension rights. Under those special circumstances we held that since the employee no longer enjoyed a beneficial interest in the rights, the divorce court could control the employee's election between alternative benefit programs. (3 Cal.3d at p. 48.)"

[794) 42-43; *Benson v. City of Los Angeles* (1963) 60 Cal.2d 355, 360-362 [33 Cal.Rptr. 257, 384 P.2d 649]; *In re Marriage of Peterson* (1974) 41 Cal.App.3d 642, 650 [115 Cal.Rptr. 184].)

These limitations on the applicability of community property doctrine reflect that pension programs not only compensate for past services but are also designed to induce persons to continue in the service of their employer by providing subsistence for employes and their dependents. (*Waite v. Waite, supra*, 6 Cal.3d 461, 472-473.) When the various goals conflict, community interests will be sacrificed when necessary to protect the private interests of employers and employees.

DISABILITY COMPENSATION

Unlike retirement pensions, veteran's disability benefits do not constitute deferred compensation for past services. While longevity of service may be a factor in determining the underlying right to disability compensation and its amount, benefits depend primarily upon physical or mental disability, compensating for loss of earning capacity in the open labor market. Earnings following dissolution are of course separate property. The secondary purpose of disability benefits is to compensate for pain, suffering, disfigurement and resulting misfortune—all personal rather than community concerns. (*In re Marriage of Jones, supra*, 13 Cal.3d 457, 462; 7 Witkin, Summary of Cal. Law (8th ed. 1974) Community Property, § 1, p. 5094.)

Because the main bases for disability compensation are loss of earning capacity and personal damage rather than past services performed, disability compensation is analogous to a personal injury award rather than to a retirement benefit. In *Washington v. Washington* (1956) 47 Cal.2d 249 [302 P.2d 569], we held that while personal injury awards recovered during marriage might be classified as community property, a cause of action for such injury becomes the injured spouse's separate property when the cause has not been reduced to judgment prior to the date of divorce. Justice Traynor reasoned that in "such a case not only may the personal elements of damages such as past pain and suffering be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and future loss of earnings are clearly attributable to him as a single person following the divorce. Moreover, as in any other case involving future earnings or other after acquired property, the wife's right, if any, to future support may be protected by an award of alimony." (47 Cal.2d 249, 253-254.)

[795] The Legislature subsequently extended the *Washington* principle to all personal injury damages and settlement payments received after interlocutory decree of dissolution. (Civ. Code, § 5126.)

For the foregoing reasons, we concluded in *In re Marriage of Jones, supra*, 13 Cal.3d 457, 464, that "military disability payments received after dissolution of a marriage should . . . be classified as the separate property of the disabled veteran." (See *In re Marriage of Olhausen* (1975) 48 Cal.App.3d 190, 192 et seq. [121 Cal.Rptr. 444] (police officer disability).)[1]

WAIVER OF RETIREMENT PENSION

The veteran in *Jones* did not possess a vested right to a retirement pension and we expressly left open the question whether a disability pension, granted after the serviceman obtains a vested right, constitutes separate property. Nevertheless, the reasoning of *Jones* requires our conclusion that disability payments are separate property whether or not the veteran's right to a retirement pension has vested.

Jones was decided when the rule existed that nonvested pension rights do not constitute community property divisible on divorce. (*French v. French, supra*, 17 Cal.2d 775, 778.) We later overruled *French* and held that nonvested pension rights are divisible upon dissolution. (*In re Marriage of Brown, supra*, 15 Cal.3d 838, 851.) Rejecting the argument that division of nonvested retirement pensions would infringe upon the employee's freedom to contract, we pointed out that recognition of the nonemployee spouse's interest in vested pension rights does not limit the employee's right to change or terminate employment, to modify employment terms including retirement benefits, or to elect between alternative retirement programs. (*Id.*, at p. 849.)

Because our decision in *Brown* determined that vested and nonvested retirement pensions shall be treated alike, no reason exists to distinguish our holding in *Jones* that disability compensation following dissolution is separate property when a disabled employee possesses nonvested retirement rights. Disability compensation is obviously a legitimate separate property interest, whether the retirement pension is vested or not. And when, as here, direct conflict exists between that interest and the

[1]The majority's formula implicitly accepts the conclusion that disability benefits are separate property. Under the formula, had there been no retirement benefits, the former spouse of the disabled employee would not be entitled to any of the disability pension.

community interest in the retirement pension, one must bow. Resolution [796] of the conflict is provided by *Washington v. Washington, supra*, 47 Cal.2d 249, 253-254, holidng disability compensation separate property but fashioning spousal support to meet the needs of the nondisabled spouse.[2]

Such holding does not result in a deprivation of the spouse's justifiable reliance on a retirement pension. Any such reliance must take into account our holding in *In re Marriage of Jones, supra*, 13 Cal.3d 47, 464 that military disability payments received after dissolution of a marriage are separate property of the disabled veteran if retirement due to disability occurs prior to vesting of a retirement pension. Thus, the spouse is on notice during the entire period when the retirement pension is assertedly earned that should the employee obtain dissolution and retire for disability, the disability payments will be separate.

THE MAJORITY OPINION

A. *The Excuse to Reconsider In re Marriage of Jones, supra, 13 Cal.3d 457.*

The majority indicate that *Jones* was somehow based on the doctrine of *French v. French, supra*, 17 Cal.2d 775, that nonvested pension rights were mere expectancies and thus not subject to division upon divorce as community property. (*Ante*, p. 785.) The majority then reason that because *French* was overruled in *In re Marriage of Brown, supra*, 15 Cal.3d 838, 851, we should now repudiate *Jones*.

The majority's indication that *Jones* was based on the expectancy doctrine is false. As shown above, the basis of *Jones* was that disability pensions are primarily compensation for loss of earning capacity and for pain, suffering, disfigurement, and resulting misfortune—all separate rather than community concerns after dissolution. *Jones* does not cite *French* or mention the expectancy doctrine. And there was a very good reason why it was not mentioned—the justices were fully aware of the likelihood that *French* and the expectancy doctrine would be repudiated. Less than a year earlier, this court in *In re Marriage of Wilson* (1974) 10

[2]Such an approach was followed by the trial court in *Waite v. Waite, supra*, 6 Cal.3d 461, 466 in dividing the retired judge's pension and providing for $1 a month support. The court ordered that, in the event the retired judge accepted a temporary judicial assignment thereby suspending pension payments, the support should be increased to an amount equal to the former spouse's share of the pension.

Cal.3d 851, 853 [112 Cal.Rptr. 405, 519 P.2d 165], stated in the second and third sentences of the opinion: "We granted a hearing upon the petition [797] of respondent wife, supported by an implied invitation from the Court of Appeal, to ascertain the current viability of the rule of *French v. French* (1941) 17 Cal.2d 775, 778 [112 P.2d 235, 134 A.L.R. 366], that pension benefits which have not yet vested are a mere expectancy and not subject to division as community property. [¶] Upon further examination of the record it appears this issue is not properly before us . . . ."

All of the justices who participated in *Jones* had participated in *Wilson*, and all participated less than a year after *Jones* when in *Brown, French* was disapproved. The right hand knew what the left hand was doing. In the circumstances, while expectancy doctrine could have furnished a basis to reach the result in *Jones*, any reliance upon expectancy doctrine of *French* in *Jones* would have been improper. *Jones* not even mentioning *French* or the expectancy doctrine, it is unreasonable to suggest that *Jones* was somehow based on *French* or the doctrine.

The excuse furnished by the majority for repudiating our recent unanimous decision in *Jones* displays a remarkable lack of candor.

B. *Results of Repudiation of Jones.*

However contrived the excuse given for reconsidering a recent unanimous decision, however weak the reasons given for repudiating the decision, in the last analysis the results following from the new rule adopted must be weighed on their own merits. When we weigh the majority's determination to repudiate *Jones*, we find that they have established an invidious discrimination between disabled employees and healthy employees who terminate employment when there is a dissolution.

Disapproving *Jones*, the majority purport to rely upon *In re Marriage of Brown, supra*, 15 Cal.3d 838. Both *Jones* and *Brown* dealt with employees who had *nonvested* retirement pension rights. *Brown* was concerned with employees generally without focusing on those who were disabled. *Brown* held that nonvested retirement pensions would be community property like vested ones. However, recognizing that nonvested pension rights might be destroyed by death or termination of employment before vesting, this court held that the uncertainties warrant refusal to divide present value of the pension and instead awarding a portion of

each pension payment as it comes due. (*In re Marriage of Brown, supra*, 15 Cal.3d 838, 848.) This court carefully pointed out that judicial recognition of the nonemployee spouse's interest in pension [798] rights does not "limit" the employee's freedom to change or terminate employment. "The employee retains the right to decide, and by this decision, the nature of the retirement benefits owned by the community." (*Id.*, at pp. 849-850.)

In short under *Brown* when the healthy employee having only *nonvested* retirement rights terminates his employment—perhaps for more lucrative employment—the nonvested pension rights are lost with the employee owing no obligation to compensate a former spouse for the loss of the nonvested pension rights. Under *Jones*, a comparable result was reached—the disabled employee having nonvested retirement rights who terminated employment and received a disability pension was not required to compensate the former spouse for loss of the nonvested pension rights.

By disapproving *Jones*, the majority single out the handicapped and compel them to compensate former spouses for loss of nonvested pension rights due to termination of employment. The disabled are placed in a worse position than the healthy who terminate employment. Former spouses of the disabled are given benefits when former spouses of the healthy are denied similar benefits.

The disabled are also placed in a worse position than the healthy employee who continues his employment. There is no liability to former spouses because there are no retirement benefits. The employee may continue to work until he dies in which event there may never be retirement pension payments. On the other hand, the employee who retires for disability under today's majority decision immediately must pay part of the disability pension to the former spouse. The former spouse of the disabled employee is entitled to benefits upon payment of the disability pension, when had the employee remained healthy the former spouse might not have been entitled to any benefits and at most could only receive delayed benefits.[1]

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[1]The majority in footnote 10 suggest that the proper comparison is between healthy employees who receive pension payments and the disabled. The comparison is not in point because no payments are made under nonvested pensions. The pension must be vested before there are payments.

Both federal and state law prohibit discrimination against the handicapped in employment. (See, e.g., 29 U.S.C. § 793; Lab. Code, §§ 1430, 1735.) Today, the majority not only permit but require discrimination against the disabled who are compensated for their inability to compete in [799] the labor market—discrimination essentially against the unemployed handicapped. I cannot join in the majority's discrimination; I cannot share their lack of compassion.

Primarily, there are three situations where there is a clear difference in the practical effects of the majority's determination to give the former spouse an interest in the disability pension and my approach to hold that the pension is separate property with spousal support available to meet the needs of the former spouse. The three situations involve justification to deny or severely limit spousal support. The disability pension and other economic resources available to the disabled employee may be insufficient to meet his needs, warranting denial of spousal support. The former spouse may have sufficient economic resources so that little or no support is required. The former spouse may remarry terminating spousal support. (Civ. Code, § 4801.)[4] In all three situations the balance of equities falls in favor of the disabled employee.

C. *The Majority's Settled Principle.*

Relying upon *Waite v. Waite, supra*, 6 Cal.3d 461, 472, and *In re Marriage of Peterson, supra*, 41 Cal.App.3d 642, 650-651, the majority proclaim the "settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse." (*Ante*, p. 786.)

However, the cases cited do not stand for the so-called "settled principle," but hold only that the possibility the employee may elect to forego an otherwise vested pension does not unvest that pension. (*Waite* and *Peterson* were decided prior to this court's decision in *Brown* holding that nonvested pensions are community property subject to division upon dissolution.)

Moreover, the so-called "settled principle" is contrary to *Brown* because, as we have seen, the employee is free to change or terminate

[4]Death of the obligor ordinarily terminates spousal support (Civ. Code, § 4801), but employee pension payments ordinarily terminate on death of the employee. As pointed out earlier, surviving spouse benefits are paid only to surviving spouses, not former spouses who may have been married to the employee during the period of employment.

employment, modify retirement terms, or elect between alternative retirement programs. (*In re Marriage of Brown, supra*, 15 Cal.3d 838, 849-850.) Dissolution of the marriage does not require an employee to retire at the earliest possible age; rather he may forego retirement and **[800]** continue working in which case there are no retirement payments to divide and the earnings after dissolution will be the employee's separate property or community property of any new marriage.[5]

I would reverse the judgment.

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[5]*In re Marriage of Cavnar* (1976) 62 Cal.App.3d 660 [133 Cal.Rptr. 267], is distinguishable on its own terms. In that case, the husband, after obtaining retirement payments at the age of 59, converted his retirement benefit plan to a disability retirement plan, receiving increased benefits. The court held that the portion of the disability benefits which could have been received as retirement benefits was a community asset. The court pointed out that *In re Marriage of Jones, supra*, 13 Cal.3d at page 462 and *In re Marriage of Olhausen, supra*, 48 Cal.App.3d at pages 193-194, holding disability pay was separate property were based on the characterization of disability benefits "as compensation for personal anguish and diminished earning capacity." The court then went on to reason that, because the husband had already retired before electing disability pay, that pay could not be characterized as compensation for diminished earning capacity or for inability to compete in the labor market. It was concluded that only part of the disability pay could be properly allocated to disability. (62 Cal.App.3d at p. 665.)

By way of contrast, in the instant case the husband commenced receiving disability pay at the age of 43, he did not receive retirement pay, and it is clear that his disability pay is compensation for the diminished ability of a one-armed man to compete in the labor market.

I would disapprove *In re Marriage of Mueller* (1977) 70 Cal.App.3d 66 [137 Cal.Rptr. 129].

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

RICHARD WILLIAM STENQUIST, Petitioner, and MARILYN BETTY STENQUIST, Respondent.	NO. D 71705 ORDER PURSUANT TO REMITTITUR AND ORDER ON ORDER TO SHOW CAUSE, ESTABLISHING SPOUSAL SUPPORT JURISDICTION, ARREARAGES AND PAYMENT THEREOF, AND FOR ATTORNEYS FEES AND COSTS

This matter came on regularly for hearing on May 11, 1979 in Department 34, before the Honorable James A. Malkus, pursuant to the decision of the California Supreme Court case In Re The Marriage of Stenquist, 21 Cal. 3d 779, the remittitur issued pursuant thereto, and also pursuant to Respondent's Order To Show Cause, the petitioner Richard William Stenquist appearing in person and by and through his attorneys Hervey, Mitchell, Ashworth & Keeney, By: Thomas Ashworth, III, Esq., and the respondent appearing in person and by and through her attorneys Rand, Day & Ziman, By: Roland B. Day, Esq., and the Court having considered the evidence and argument of counsel and good cause appearing therefor;

IT IS HEREBY ORDERED AND ADJUDGED that total arrearages owing and unpaid by petitioner to the respondent for her portion of the community property interest in the disability pay received by petitioner, subject to all credits to which petitioner is entitled, through April 1979, amount to $16,929.34, made up of $14,754.34 in principal arrearages and $2,175.00 in interest.

IT IS FURTHER ORDERED that the aforementioned principal arrearages shall draw interest at the legal rate of 7% per annum, until further order of Court and if the California laws pertaining to interest on judgments shall change hereafter, such changes shall apply to the unpaid principal herein, unless this Court shall make such other and different order as it deems proper.

IT IS FURTHER ORDERED that the aforementioned total arrearages including principal and interest, together with accruing legal interest on the aforementioned principal, shall be payable by the petitioner to the respondent, starting June 1, 1979, at the rate of $150.00 per month (or more, at petitioner's option). Such payments shall continue for 14 months, through July 1, 1980, said payments to apply first to interest, then to principal. Thereafter, commencing August 1, 1980, and payable on the first day of each month thereafter, for such additional period as is necessary to pay all principal and interest in full, petitioner shall pay to respondent no less than $250.00 per month on said arrearages and interest, all subject to any such further Court orders as may be made hereafter.

IT IS FURTHER ORDERED that so long as petitioner is current on the aforementioned payment of arrearages, no levy from this Court shall issue, all subject to such further orders as this Court may make.

IT IS FURTHER ORDERED that this Court expressly reserves jurisdiction regarding the obligation by petitioner to pay spousal support to the respondent, until the death of either party, remarriage of the respondent, or until further order of this Court.

IT IS FURTHER ORDERED that petitioner shall pay directly to respondent's attorneys, as and for attorneys fees and costs for all proceedings herein attorneys fees of $1,200.00, and actual costs pursuant to the cost bill herein of $185.96, or a total of $1,385.96, and shall pay the same at the rate of $100.00 or more per month, commencing June 1, 1979, and continuing on the first day of each month thereafter, and shall pay the same directly to Rand, Day & Ziman, 2120 Fourth Avenue, San Diego, CA 92101. So long as payment on such order for fees and cost payments are current, no levy from this Court shall issue, in reference to collecting the same.

IT IS FURTHER ORDERED that the Court herein shall expressly keep continuing jurisdiction over all matters described herein in the anticipation that upon the change of circumstances of the parties, that either may seek from this Court a different order for payment of the arrearages and interest thereon as described above, and/or attorneys fees and costs.

IT IS FURTHER ORDERED that all prior orders of this Court set forth in the Interlocutory and Final Judgments herein and otherwise, not inconsistent with the Orders herein, shall remain in full force and effect.

APPROVED AS TO FORM:

Dated: 9/6/79

HERVEY, MITCHELL, ASHWORTH
& KEENEY,
By: THOMAS ASHWORTH, III
Attorneys for Petitioner

Dated: 9/10/79

RAND, DAY & ZIMAN,
By: ROLAND B. DAY
Attorneys for Respondent

DATED: SEP 2 1979

JUDGE OF THE SUPERIOR COURT
JAMES A. MALKUS

E-1

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS): TELEPHONE NO.	FOR COURT USE ONLY
Roland B. Day, Esq. (714) 232-5073 Rand, Day & Ziman 2120 Fourth Avenue San Diego, CA 92101 ATTORNEY FOR (NAME): Respondent	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 220 West Broadway MAILING ADDRESS: CITY AND ZIP CODE: San Diego, CA 92112 BRANCH NAME:	
MARRIAGE OF PETITIONER: RICHARD W. STENQUIST RESPONDENT: MARILYN B. STENQUIST CLAIMANT:	
ORDER AFTER HEARING ☒ MODIFICATION ☐ Child Custody ☐ Visitation ☐ Child Support ☒ Spousal Support ☒ Attorney Fees and Costs ☐ Joinder ☐ Injunctive Order ☒ Other (Specify): RESPONDENT'S RIGHT TO PORTION OF DISABILITY PAY	CASE NUMBER D 71705

1. This proceeding came on for hearing as follows

a. Date: 2/4/82 ☒ Dept.: 25 ☐ Div.: ☐ Room:

b. Judge (Name): ☐ Temporary Judge

c. ☒ Petitioner present in court ☒ Attorney present in court (Name): Daniel B. Hunter, Esq.

d. ☒ Respondent present in court ☒ Attorney present in court (Name): Roland B. Day, Esq.

e. ☐ Claimant present in court ☐ Attorney present in court (Name):

f. ☐ On the Order to Show Cause filed
Date: By:

g. ☒ On the Motion filed
Date: 12/4/81 By: Respondent

2. ☒ Evidence was presented by Delcarations & Points and Authorities
☐ the parties entered into a stipulation, and the matter was submitted.

3. IT IS ORDERED ☐ Pending trial or until further order of this court
☒ Existing orders shall continue in effect, except as modified by this order

a. ☐ Custody and support of the minor children of the parties are fixed as follows

Child (Name and age):	Custody to:	Monthly Child Support:	Payable by:	Payable on:
		$		

b. ☐ Petitioner ☐ Respondent ☐ Claimant shall have
(1) ☐ reasonable visitation rights with the minor children.
(2) ☐ the following visitation rights:

c. ☒ Petitioner ☐ Respondent shall pay as spousal support
(1) To ☐ Petitioner ☒ Respondent ☐ Other (specify):
(2) Amount: $1,000.00 per month.
(3) Payable: First day of each month commencing January 1, 1982.
(all as more fully described hereafter)

ORDER AFTER HEARING
(FAMILY LAW)

ADDITIONAL ORDERS

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, and the court expressly finds, that under the present State of California law existing as of February 4, 1982, the California Supreme Court case of *In Re Marriage of Stenquist*, (1978) 21 Cal. 3d 799 and the Order of this court by the Honorable James A. Malkus of September 20, 1979, and each of them, constitute the law of this case, being final judgments from which no appeals were taken, and notwithstanding the U.S. Supreme Court cases of *McCarty vs. McCarty*, and *Ridgeway vs. Ridgeway*, that pursuant to the California Appellate cases of *In Re Marriage of Mahone*, 123 Cal. App. 3d 17 (August 26, 1981), *In Re Marriage of Sheldon*, 124 Cal. App. 3d 371 (October 9, 1981 and modified November 4, 1981 at 125 Cal. App. 3d 415F) and *In Re Marriage of Fellers*, 125 Cal. App. 3d 254 (November 4, 1981), that the *McCarty* decision is not in fact retroactive in its effect and that the *Ridgeway* decision is inapplicable to this cause. For all of said reasons, this court finds that the orders heretofore made of this court as to the community property nature of the disability payments in question and this court's Order by which the petitioner has been ordered to pay one-third of said disability payments as received directly to the respondent as her share of said community property, are presently binding and in full force and effect and have been so at all times heretofore, and petitioner is ordered to comply therewith.

IT IS FURTHER ORDERED that pursuant to the Motion of respondent (and upon her express offer to give those credits as described

hereafter made by her through her attorneys in open court) pending the outcome of any appeal taken from this Order, and in the absence of payment by the petitioner to respondent of the one-third portion of the disability pay and those arrearage payments heretofore ordered against him and herein reaffirmed, that the petitioner shall pay to respondent, on the first day of each and every month hereafter commencing January 1, 1982, the sum of $1,000.00 per month as and for the spousal support of the respondent. (It is the express intention of the court in making said Order that as of February 4, 1982, that petitioner owes $2,000.00 thereon to respondent.) Said Order shall continue as aforementioned, or until the respondent shall earlier marry, either party shall die, or until said Order is modified by the court upon good cause first being shown.

IT IS FURTHER ORDERED that based on the formal offer and stipulation of the respondent herein in open court as to the same, as to all the aforementioned spousal support payments actually paid by the petitioner to the respondent, that petitioner shall be entitled to a "dollar for dollar" credit against any monies which he would otherwise owe to her as to the one-third of the disability payments heretofore ordered payable by him to her, and the arrearages and interest which have accumulated pursuant to previously ordered and unpaid disability payments and interest, all as more fully described below.

IT IS FURTHER ORDERED that petitioner cooperate with respondent, through the parties' attorneys to give the necessary information regarding all disability pay received by him, so that all arrearages may be established. Upon express stipulation of the parties following the hearing herein, as evidenced by the approval as to form indicated below, it is ordered that the establishment of such arrearages may be set forth by subsequent Supplemental Order herein, petitioner representing that he does not yet have the necessary information. The court expressly reserves

jurisdiction over the establishment of the arrearages if the parties cannot agree thereto.

APPROVED AS TO FORM:

DANIEL B. HUNTER
Attorney for Petitioner

Dated: May 13, 1982

RAND, DAY & ZIMAN,
By: ALLAN W. ZIMAN
Attorneys for Respondent

Dated: May 18, 1982

Dated: MAY 20 1982

BEN W. HAMRICK
JUDGE OF THE SUPERIOR COURT

430,431

[145 Cal.App.3d 430]

[Civ. No. 28033. Fourth Dist., Div. One. July 26, 1983.]

In re the Marriage of MARILYN S. and RICHARD W. STENQUIST.
RICHARD W. STENQUIST, Appellant, v.
MARILYN S. STENQUIST, Respondent.

SUMMARY

A divorced woman who had been awarded a portion of her former husband's military disability retirement pension brought a motion to compel in the trial court after the husband, in reliance on a federal judicial decision regarding military pensions, ceased making payments. Although the award had been upheld on a previous appeal on grounds the husband's unilateral election to receive a disability pension instead of a retirement pension had improperly allowed him to transmute community property into separate property, the husband asserted the state court decision had been overruled by the federal decision. The trial court granted the wife's motion. (Superior Court of San Diego County, No. D71705, Benjamin W. Hamrick, Judge.)

The Court of Appeal affirmed. The court held the husband was precluded from attacking the decision upholding the award, even assuming the federal decision on which he relied was controlling, since the state court decision had become final long before the federal decision was issued. The court further held the doctrines of res judicata and law of the case precluded reexamination of the issue whether the husband's disability retirement payments were, in part, properly treated as community property. Finally, the court held that, under the facts of the instant case, the award to the wife did not violate the supremacy clause of the United States Constitution, since the federal decision did not purport to deal with disability retirement, and since the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408) failed to address whether disability retirement pay could or could not be treated by state courts as property of the member or as community property. The court held that, in order to find congressional preemption of a state rule or statute, it is essential to find Congress actually considered and reached a decision concerning the issue involved. (Opinion by Staniforth, J., with Cologne, Acting P. J., and Work, J., concurring.)

[145 Cal.App.3d 431]

HEADNOTES

(1) **Dissolution of Marriage; Separation § 60—Division of Community and Quasi-community Property—Revision and Modification of Division—Military Pensions.**—A man whose obligation to pay his former wife a portion of his military disability retirement pension had been upheld on a previous appeal was precluded from attacking such decision on grounds it had been overruled by a subsequent federal decision regarding military pensions, even assuming such federal decision was controlling, where the state court decision had become final long before the federal decision was issued. Further, the doctrines of res judicata and law of the case precluded reexamination of the issue whether the husband's disability retirement payments were, in part, properly treated as community property.

[See **Cal.Jur.3d**, Family Law, §§ 403, 419; **Am.Jur.2d**, Community Property, §§ 10, 53.]

(2) **Dissolution of Marriage; Separation § 50—Division of Community and Quasi-community Property—Property Subject to Division—Military Disability Pension—Federal Preemption.**—An award to a spouse, as community property, of a portion of the other spouse's military disability retirement pension, which the pensioner elected to receive, even though he was also eligible for a nondisability retirement pension, did not violate the supremacy clause of the United States Constitution, since a federal judicial decision regarding military pensions did not purport to deal with disability retirement, and since the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408) failed to address whether disability retirement pay could or could not be treated by state courts as property of the member or as community property. In order to find congressional preemption of a state rule or statute, it is essential to find Congress actually considered and reached a decision concerning the issue involved.

COUNSEL

Daniel B. Hunter and Hunter & Ryan for Appellant.

Harold F. Tyvoll, Roland B. Day and Rand, Day & Ziman for Respondent.

OPINION

STANIFORTH, J.—The California Supreme Court in *In re Marriage of Stenquist* (1978) 21 Cal.3d 779 [148 Cal.Rptr. 9, 582 P.2d 96], determined that to permit a spouse, by unilateral election to receive a military disability pension instead of a retirement pension, would allow the spouse to transmute community property into separate property and thereby negate the protective philosophy of the community property law of California. Thus the Supreme Court approved an award to the wife of that portion of the husband's disability pay which represented one-half of her community interest in what would have been her husband's normal retirement pension. On remand from the Supreme Court, the superior court issued its order that all prior orders of the court as set forth in the interlocutory and final judgment should remain in full force and effect (Sept. 20, 1982). Long after the remittitur had issued in *In re Marriage of Stenquist* (Aug. 8, 1978), the husband, in reliance upon the decision of the United States Supreme Court in *McCarty v. McCarty* (1981) (453 U.S. 210 [69 L.Ed.2d 589, 101 S.Ct. 2728]), ceased making payments to the wife. The wife sought, by a motion to compel, continuance of the payments. The husband opposed the motion, arguing that the *McCarty* decision and the later decision of *Ridgway v. Ridgway* (1981) 454 U.S. 46 [70 L.Ed.2d 39, 102 S.Ct. 49], had overruled *In re Marriage of Stenquist*. The superior court rejected the husband's contention and granted the wife's motion. The husband appeals.

Discussion

I

(1) The husband seeks to reexamine a long final decision of our Supreme Court. If we assume *McCarty* is controlling (which it is not), it would have limited application only to those judgments not yet final at the time of the decision, to wit June 26, 1981. (*In re Marriage of Sheldon* (1981) 124 Cal.App.3d 371, 376, 384 [177 Cal.Rptr. 380]; *In re Marriage of Parks* (1982) 138 Cal.App.3d 346, 348-349 [188 Cal.Rptr. 26]; *In re Marriage of Fellers* (1981) 125 Cal.App.3d 254, 256-257 [178 Cal.Rptr. 35].) Thus, even if arguendo the husband's position is correct, it does not create a right to attack a decision final long before the *McCarty* decision.

Furthermore, the husband seeks to relitigate whether his disability retirement payments are, in part, properly treated as community property. This is the identical issue presented in *In re Marriage of Stenquist, supra*, before the California Supreme Court. He may not now question

this judgment. (*Levy v. Cohen* (1977) 19 Cal.3d 165, 171 [137 Cal.Rptr. 162, 561 P.2d 252].) Not only does the doctrine of res judicata apply but also the doctrine

of the law of the case precludes reexamination here. (*People v. Triggs* (1973) 8 Cal.3d 884, 890-891 [106 Cal.Rptr. 408, 506 P.2d 232].)

II

(2) Although the reasons and rules discussed in I above dispose of the husband's appeal, we examine his argument that the State of California cannot award a spouse, as community property, a portion of disability retirement pay of a member of the Armed Forces of the United States because such an award is void as an unconstitutional infringement upon the supremacy clause of the United States Constitution. In support of this position, the husband cites a series of cases for the rule pensions granted by the federal government are a matter of bounty and no pensioner has a vested right in his pension, e.g., *United States v. Teller* (1883) 107 U.S. 64, 68 [27 L.Ed. 352, 354, 2 S.Ct. 39]; *McCarty v. McCarty, supra*, 453 U.S. 210.

Several things are wrong with the husband's reasoning. In the first place, *McCarty* does not purport to deal with disability retirement, the issue involved here. Further, the Congress on February 1, 1983, enacted the Uniformed Services Former Spouses' Protection Act (the Act), Public Law No. 97-252, an amendment to title 10 of the United States Code. The Act overrules *McCarty*, stating: "[A] court may treat disposable retired or retainer pay payable to a member for pay periods beginning after July 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. § 1408(c)(1).) The husband points to the fact that Congress, in addition to overruling *McCarty*, said however in defining "disposable retired or retainer pay," specifically excluded "the retired pay of a member retired for disability under chapter 61 of [title 10]. . . ." (10 U.S.C. § 1408(a)(4).) From this legislative history, it has been argued that Congress has not withheld from the State of California the power to apply state community property laws to disability pay. It is asserted the state may not directly interfere with the legitimate exercise of the federal government's power to determine to whom disability-retired service members' disability pay may be given. Any attempt to do so is void as an unconstitutional infringement upon

the powers of Congress as protected by the supremacy clause of the United States Constitution, article VI, clause 2.

In *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) __ U.S. __ [73 L.Ed.2d 664, 102 S.Ct. 3014], there was a direct conflict between the State of California as enunciated in its *Wellenkamp* decision (*Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943 [148 Cal.Rptr. 379, 582 P.2d 970]) and the regulations issued by the Federal Home Loan Bank Board pursuant to the Home Owners' Loan Act of 1933. The Supreme Court said:

[145 Cal.App.3d 434]

"Even where Congress has not completely displaced state regulation in a specific area, *state law is nullified to the extent that it actually conflicts with federal law*. Such conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, *or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' Hines v. Davidowitz*, 312 U.S. 52, 67. See also *Jones v. Rath Packing Co.*, 430 U.S., at 526; *Bethlehem Steel Co. v. New York Labor Relations Bd.*, 330 U.S. 767, 773. These principles are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' *Free v. Bland*, 369 U.S. 663, 666; see also *Ridgway v. Ridgway*, 454 U.S. 46, 54-55." (*Fidelity Federal Sav. & Loan Ass'n. v. de la Cuesta, supra*, __ U.S. at p. __ [73 L.Ed.2d at p. 675, 102 U.S. at p. 3022]; italics added.) Thus the United States Supreme Court concluded Federal Home Loan Bank Board regulations preempted the due on sale restrictions of *Wellenkamp*. Contrary to the bank regulations in *Fidelity Federal Sav. & Loan Assn., supra*, the Act fails to address whether disability retirement pay may or may not be treated by state courts as property of the member or of his or her spouse's community property. The husband infers the Act must be read to prohibit the State of California from treating disability retirement pay as community property since by this omission Congress has not accorded to the states power to apply state community property laws to disability pay. However, in order to find congressional preemption of a state rule or statute, it is essential to find Congress actually considered and reached some decision concerning the issue involved. (See *United States v. Bass* (1971) 404 U.S. 336, 349, 350 [30 L.Ed.2d 488, 497, 498, 92 S.Ct. 515].)

The United States Supreme Court recently said: "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted. [Citation.]" (*Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 581 [59 L.Ed.2d 1, 10, 99 S.Ct. 802].) It should be noted here that under California law, the disability retirement pay of a member of the military armed forces is treated as separate property. (*In re Marriage of Jones* (1975) 13 Cal.3d 457 [119 Cal.Rptr. 108, 531 P.2d 420].)

The judgment in *In re Marriage of Stenquist, supra*, awarded a portion of Colonel Stenquist's disability retirement pay to his former spouse only because Stenquist was eligible to receive either disability or nondisability retirement pay, and he elected upon retirement to receive disability pension of 75 percent of his base pay rather than nondisability retirement at 65

[145 Cal.App.3d 435]

percent of his base pay. The trial court treated the 10 percent excess of the disability pension as representing additional compensation attributable to Stenquist's disability and classifed the balance as retirement benefits acquired during the marriage as community property. By this disposition, the California rule which prevents a spouse from transmuting community property into separate property by unilateral decision thereby defeating the interest of the other party was vindicated. Pending some positive treatment by Congress indicating the inapplicability of this *Stenquist* rule on the Stenquist facts here, the decision should not be held to violate the federal supremacy clause.

Judgment affirmed.

Cologne, Acting P.J., and Work, J., concurred.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 20 1977

I have this day filed Order ____

HEARING DENIED

In re: 4 Civ. *No.* 28033

RICHARD W. STENQUIST

vs.

MARILYN R. STENQUIST

Respectfully,

Clerk

1982 FEDERAL UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

10 USD §1002 ff
TITLE X

PUBLIC LAW 97-252

TITLE X — FORMER SPOUSES PROTECTION

SHORT TITLE

Sec. 1001. This title may be cited as the "Uniformed Services Former Spouses' Protection Act."

PAYMENT OF RETIRED AND RETAINER PAY

Sec. 1002. (a) Chapter 71 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"§1408. Payment of retired or retainer pay in compliance with court orders

"(a) In this section:

"(1) 'Court' means —

"(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

"(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

"(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

"(2) 'Court order' means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued degree), which —

"(A) is issued in accordance with the laws of the jurisdiction of that court;

"(B) provides for —

"(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)))";

"(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)))"; or

"(iii) division of property (including a division of community property); and

"(C) specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

"(3) 'Final decree' means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

"(4) 'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which —

"(A) are owed by that member to the United States;

"(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

"(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

"(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i) if such member presents evidence of a tax obligation which supports such withholding;

"(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

"(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

"(5) 'Member' includes a former member.

"(6) 'Spouse or former spouse' means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

"(b) For the purposes of this section —

"(1) service of a court order is effective if —

"(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

"(B) the court order is regular on its face;

"(C) the court order or other documents served with the court order identify the member concerned and include the social security number of such member; and

"(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (950 U.S.C. App. 501 et seq.) were observed; and

"(2) a court order is regular on its face if the order —

"(A) is issued by a court of competent jurisdiction;

"(B) is legal in form; and

"(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

"(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

"(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

"(3) This section does not authorize any court to order a member to apply for a retirement or retire at a particular time in order to effectuate any payment under this section.

"(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial

jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

"(d)(1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

"(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

"(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

"(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

"(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division

of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

"(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

"(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse from the disposable retired or retainer pay of a member, such pay shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

"(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse from the disposable retired or retainer pay of the same member, the Secretary concerned shall —

"(i) pay to that spouse the least amount of disposable retired or retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

"(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of —

"(I) the difference between the largest amount of retired or retainer pay required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

"(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42

U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus —

"(I) the amount of disposable retired or retainer pay paid under clause (i) and

"(II) the amount of disposable retired or retainer pay retained under clause (ii).

"(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

"(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

"(B) Notwithstanding ay other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

"(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount of disposable retired or retainer pay that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former

spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

"(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

"(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribe pursuant to subsection (h).

"(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

"(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

"(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section".

"(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"1408. Payment of retired or retainer pay in compliance with court orders".

ANNUITIES UNDER THE SURVIVOR BENEFIT PLAN

Sec. 1003. (a) Section 1447 of title 10, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(6) 'Former spouse' means the surviving former husband or wife of a person who is eligible to participate in the Plan.

"(7) 'Court' has the meaning given tht term by section 1408(a(1) of this title.

"(8) 'Court order' means a court's final decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or of a court ordered, ratified, or approved property settlement agreement incident to such previously issued decree).

"(9) 'Final decree' means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for the taking of such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

"(10) 'Regular on its face,' when used in connection with a court order, means a court order that meets the conditions prescribed in section 1408(b)(2) of this title".

(b)(1) Section 1448(a) of such title is amended —

(A) in paragraph (3)(A) by inserting "or elects to provide an annuity under subsection (b)(2) of this section," after "for his spouse,"; and

(B) in paragraph (3)(B) by inserting "or elects to provide an annuity under subsection (b)(2) of this section," after "for his spouse".

(2) Section 1448(b) of such title is amended to read as follows:

(b)(1) A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person or to provide an annuity to a former spouse.

"(2) A person who is married or has a dependent child may elect to provide an annuity to a former spouse instead of providing an annuity to a spouse or dependent child if the election is made in order to carry out the terms of a written agreement entered into voluntarily with the former spouse (without regard to whether such agreement is included in or approved by a court order).

"(3) In the case of a person electing to provide an annuity under paragraph (1) or (2) of this subsection by virtue of eligibility under subsection (a)(1)(B), the election shall include a designation under subsection (e).

"(4) Any person who elects under paragraph (1) or (2) to provide an annuity to a former spouse shall, at the time of making such election, provide the Secretary concerned with a written statement, in a form to be prescribed by that Secretary, signed by such person and the former spouse setting forth whether the election is being made pursuant to a voluntary written agreement previously entered into by such person as a part of or incident to a proceeding of divorce, dissolution, annulment, or legal separation, and if so, whether such voluntary written agreement has been incorporated in or ratified or approved by a court order".

(c) Section 1450(a)(4) of such title is amended —

(1) by inserting "formr spouse or other" before "natural person"; and

(2) by striking out "if there is no eligible beneficiary under clause (1) or clause (2)" and inserting in lieu thereof "unless the election to provide an annuity to the former spouse or other natural person has been changed as provided in subsection (f)".

(d) Section 1450(f) of such title is amended to read as follows:

"(f)(1) A person who elects to provide an annuity to a person designated by him under section 1448(b) of this title may, subject to paragraph (2) of this subsection, change that election and provide an annuity to his spouse or dependent child. The Secretary concerned shall notify the former spouse or other natural person previously designated under section 1448(b) of this title of any change of election under the first sentence of this paragraph. Any such change of election is subject to the same rules with respect to execution, revocation, and effectiveness as are set forth in section 1448(a)(5) of this title.

"(2) A person who, incident to a proceeding of divorce, dissolution, annulment, or legal separation, enteres into a voluntary written agreement to elect under section 1448(b) of this title to provide an annuity to a former spouse and who makes an election pursuant to such agreement may not change such election under paragraph (1) unless —

"(A) in a case in which such agreement has been incorporated in or ratified or approved by a court order the person —

"(i) furnishes to the Secretary concerned a certified copy of a court order which is regular on its face and

modifies the provisions of all previous court orders relating to the agreement to make such election so as to permit the person to change the election; and

"(ii) certifies to the Secretary concerned that the court order is valid and in effect; or

"(B) in a case in which such agreement has not been incorporated or ratified or approved by a court order, the person —

"(i) furnishes to the Secretary concerned a statement, in such form as the Secretary concerned may prescribe, signed by the former spouse and evidencing the former spouse's agreement to a change in the election under paragraph (1) and

"(ii) certifies to the Secretary concerned tht the statement is current and in effect.

"(3) Nothing in this chapter authorizes any court to order any person to elect under section 1448(b) of this title to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such election".

MEDICAL BENEFITS

Sec. 1004. (a) Section 1072(2) of title 10, United States Code, is amended —

(1) by striking out "and" at the end of clause (D);

(2) by striking out the period at the end of clause (E) and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following new clause:

"(F) the unremarried former spouse of a member or former member who (i) on the date of the final decree of divorce, dissolution, or annulment, had been married to the member or former member for a period of at least 20 years during which period the member or former member performed at least 20 years of service which is creditable in determining that member's or former member's eligibility for retired or retainer pay, or equivalent pay, and (ii) doe snot have medical coverage under an employer-sponsored health plan."

(b) Section 1076(b) of such title is amended by inserting at the end thereof the following: "A dependent described in section 1072(2)(F) of this title may be provided medical and dental care pursuant to clause (2) without regard to subclause (B) of such clause".

(c) Section 1086(c) of such title is amended by inserting after clause (2) the following new clause:

"(3) A dependent covered by section 1072(2)(F) of this title".

COMMISSARY AND EXCHANGE PRIVILEGES

Sec. 1005. The Secretary of Defense shall prescribe such regulations as may be necessary to provide that an unremarried former spouse described in subparagraph (F)(i) of section 1072(2) of title 10, United States Code (as added by section 904), is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services.

EFFECTIVE DATES AND TRANSITION

Sec. 1006. (a) The amendments made by this title shall take effect on the first day of the first month which begins more than 120 days after the date of the enactment of this title.

(b) Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

(c) The amendments made by section 1003 of this title shall apply to persons who become eligible to participate in the Survivor Benefit Plan provided for in subchapter II of chapter 73 of title 10, United States Code, before, on, or after the effective date of such amendments.

(d) The amendments made by section 1004 of this title and the provisions of section 1005 of this title shall apply in the case of any former spouse of a member or former member of the uniformed services only if the final decree of divorce, dissolution, or annulment of the marriage of the former spouse and such member or former member is dated on or after the effective date of such amendments.

(e) For the purposes of this section —

(1) the term "court order" has the same meaning as provided in section 1408(a)(2) of title 10, United States Code (as added by section 1002 of this title);

(2) the term "former spouse" has the same meaning as provided in section 1408(a)(6) of fsuch title (as added by section 1002 of this title); and

(3) the term "uniformed services" has the same meaning as provided in section 1408(a)(7) of such title (as added by section 1002 of this title).

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